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1939.

THE

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AND

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1939.

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MEMORANDA.

1939.

Feb. 2. *This day* The Right Hon. Sir Thomas Walker Hobart Inskip, C.B.E., *was, by His Majesty's Command, sworn one of His Majesty's Principal Secretaries of State.*

Feb. 2. *This day* Mukand Ramrao Jayakar, Esq., *was, by His Majesty's Command, appointed a Member of His Majesty's Most Honourable Privy Council.*

Feb. 7. The Right Hon. Sir Frederick Arthur Greer, *sometime a Lord Justice of Appeal, received the dignity of a Barony of the United Kingdom by the name, style and title of Baron Fairfield, of Caldy, in the County Palatine of Chester.*

Feb. 13. James Dale Cassels, Esq., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

Feb. 13. Hugh Imbert Periam Hallett, Esq., M.C., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

Apr. 18. The Right Hon. Mukand Ramrao Jayakar, *was appointed to the office of one of the Members of the Judicial Committee of the Privy Council in the place of the* Right Hon. Sir Shadi Lal, *resigned.*

May 5. *This day* The Right Hon. Mukand Ramrao Jayakar, *having been appointed a Member of His Majesty's Most Honourable Privy Council on the 2nd of February,* 1939, *made affirmation, and, by His Majesty's Command, took his place at the Board accordingly.*

May 20. *This day* The Right Hon. Henry Edward, Baron Merrivale, *sometime President of the Probate, Divorce and Admiralty Division of His Majesty's High Court of Justice, died at Walkhampton in his* 84*th year.*

June 5. The Hon. Mr. Justice Hodson *was appointed to be Chairman of a Committee to consider the administration and working of the Poor Persons Rules.*

June 20. James Willoughby Jardine, Esq., K.C., *was appointed to be Attorney-General and* Geoffrey Hugh Benbow Streatfeild, Esq., M.C., K.C., *to be Solicitor-General of the County Palatine of Durham.*

Aug. 4. Sir Philip James Macdonell, *formerly Chief Justice of Ceylon, having been sworn a Member of His Majesty's Most Honourable Privy Council on the 25th of July,* 1939, *was appointed to be a Member of the Judicial Committee of the Privy Council under Section one of the Judicial Committee Act,* 1833.

Aug. 5. The Right Hon. Richard William Alan, Earl of Onslow, G.B.E., *Chairman of Committees of the House of Lords,* The Right Hon. Sir Wilfrid Arthur Greene, O.B.E., *Master of the Rolls,* The Right Hon. Sir Frank Boyd Merriman, O.B.E., *President of the Probate, Divorce and Admiralty Division of the High Court of Justice,* Mr. Justice Cassels *and* Mr. Justice Hallett, M.C., *were appointed to be Commissioners for the care and custody of the Great Seal of the Realm during any absence of the* Right Hon. Frederic Herbert, Baron Maugham, *Lord High Chancellor of Great Britain, from the United Kingdom.*

Aug. 21. *This day* THE RIGHT HON. SIR JOHN ASTBURY, *sometime a Justice of His Majesty's High Court of Justice, Chancery Division, died at Sandwich, Kent, aged* 79.

Sept. 4. THE RIGHT HON. LORD MAUGHAM *having resigned the position of Lord Chancellor of Great Britain, His Majesty in Council was this day pleased to deliver the Great Seal to* THE RIGHT HON. SIR THOMAS INSKIP, C.B.E., *who thereupon Kissed Hands on appointment, and took his place at the Board accordingly.*

Sept. 4. *This day, in the presence of the Lord President of the Council,* THE RIGHT HON. SIR THOMAS INSKIP, C.B.E., *was sworn Lord Chancellor.*

Sept. 5. *This day, in the presence of the Lord President of the Council,* HUGH PATTISON, LORD MACMILLAN, G.C.V.O., *was sworn Minister of Information.*

Sept. 7. *The dignity of a Viscount of the United Kingdom was conferred upon* THE RIGHT HON. SIR THOMAS WALKER HOBART INSKIP, C.B.E., *by the name, style and title of Viscount Caldecote, of Bristol, in the County of Gloucester.*

Sept. 22. *The dignity of a Viscount of the United Kingdom was conferred upon* THE RIGHT HON. FREDERIC HERBERT, BARON MAUGHAM, *lately Chancellor of Great Britain, by the name, style and title of Viscount Maugham, of Hartfield, in the County of Sussex.*

Oct. 6. THE RIGHT HON. FREDERIC HERBERT, VISCOUNT MAUGHAM, *was appointed to be a Lord of Appeal in Ordinary under the provisions of the Appellate Jurisdiction Act,* 1876, *as amended by any subsequent enactment.*

Nov. 17. *This day* THE HON. NICOLAAS JACOBUS DE WET (*Chief Justice of the Union of South Africa*), *was, by His Majesty's command, appointed a Member of His Majesty's Most Honourable Privy Council.*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1939, will be as follows :—

In the First Series,
[1939] Ch.
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In the Third Series,
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The Scottish Law Reports are cited as follows :

Shaw, or, First Series Court of Session Cases . .	by	S.
Dunlop, or, Second Series ,, ,, ,, . .	,,	D.
Macpherson, or, Third Series ,, ,, ,, . .	,,	M.
Rettie, or, Fourth Series ,, ,, ,, . .	,,	R.
Fraser, or, Fifth Series ,, ,, ,, . .	,,	F.
New Series ,, ,, ,, . .	,,	1907 S. C.
Scottish Law Reporter ,, ,, ,, . .	,,	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases .	,,	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Adabla (substituted for Afianu, decd.) *v.* Gbevlo Agama P. C. 497

Appu, S. Don Manis, Cadija Umma *v.* – – – P. C. 136

Arantzazu Mendi, S.S. *v.* Government of the Republic of Spain – – H. L. (E.) 256

Associated Portland Cement Manufacturers, Ld., Harris *v.* H. L. (E.) 71

Attorney-General for Alberta *v.* Attorney-General for Canada P. C. 117

——— for Canada, Attorney-General for Alberta *v.* – – – P. C. 117

——— for Palestine, Saadat Kamel Hanum *v.* P. C. 508

B.

PAGE

Bennett, Ladore *v.* – P. C. 468

Black Sea & Baltic General Insurance Co., Ld., Reardon Smith Line, Ld. *v.* H. L. (E.) 562

British & French Trust Corporation, Ld., New Brunswick Rail Co. *v.* – – H. L. (E.) 1

Burton, Dobson Ship Repairing Co., Ld. *v.* – – H. L. (E.) 590

Butler *v.* The King P. C. 484

C.

Cadija Umma *v.* S. Don Manis Appu – – P. C. 136

Canadian National Ry. Co., Montreal Trust Co. *v.* P. C. 613

PAGE

Caxton Publishing Co., Ld. *v.* Sutherland Publishing Co. H. L. (E.) 178
Chung Chi Cheung *v.* The King P. C. 160

D.

Diamond, S.S. (Owners), Heranger S.S. (Owners) *v.* H. L. (E.) 94
Dobson Ship Repairing Co., Ld. *v.* Burton – – H. L. (E.) 590

F.

Farley *v.* Westminster Bank H. L. (E.) 430

G.

Gbevlo Agama, Adabla *v.* P. C. 497
Gokal Chand-Jagan Nath (Firm) *v.* Nand Ram Das-Atma Ram (Firm) – – P. C. 106
Goldsbrough Mort & Company, Ld., Maurice *v.* – P. C. 452

H.

Harris *v.* Associated Portland Cement Manufacturers, Ld. H. L. (E.) 71
Heranger, S.S. (Owners) *v.* Diamond, S.S. (Owners) H. L. (E.) 94

I.

Imperial Airways, Ld., Philippson *v.* – – H. L. (E.) 332

K.

Khoo Soo Chong, Tan Ma Shwe Zin *v.* – – P. C. 527

L.

Ladore *v.* Bennett – P. C. 468
Lord Advocate, Tennant *v.* H. L. (Sc.) 207

PAGE

M.

Mahant Singh *v.* U Ba Yi P. C. 601
Maurice *v.* Goldsbrough Mort & Company, Ld. – P. C. 452
Montreal Trust Co. *v.* Canadian National Ry. Co. P. C. 613
Moss' Empires, Ld. *v.* Olympia (Liverpool), Ld. – H. L. (E.) 544

N.

Nand Ram Das-Atma Ram (Firm), Gokal Chand-Jagan Nath (Firm) *v.* – P. C. 106
New Brunswick Rail Co. *v.* British & French Trust Corporation, Ld. – H. L. (E.) 1
New Zealand Farmers Co-Operative Association of Canterbury, Ld., Wright *v.* P. C. 439
Nomikos (Petros M.), Ld., Robertson *v.* – H. L. (E.) 371
Northumbrian Shipping Co., Ld. *v.* Timm (E.) & Son, Ld. H. L. (E.) 397

O.

Olympia (Liverpool), Ld., Moss' Empires, Ld. *v.* – H. L. (E.) 544
Oxford City Council *v.* Oxfordshire County Council H. L. (E.) 48
Oxfordshire County Council, Oxford City Council *v.* H. L. (E.) 48

P.

Petros M. Nomikos, Ld., Robertson *v.* – – H. L. (E.) 371
Philippson *v.* Imperial Airways, Ld. – – – H. L. (E.) 332
Pratt *v.* Pratt – H. L. (E.) 417
Pyrmont, Ld. *v.* Schott P. C. 145

R.

Radcliffe *v.* Ribble Motor Services, Ld. – – H. L. (E.) 215
Reardon Smith Line, Ld. *v.* Black Sea & Baltic General Insurance Co., Ld. H. L. (E.) 562

PAGE

Rex, Butler *v.* – P. C. 484

—— Chung Chi Cheung *v.* P. C. 160

Ribble Motor Services, Ld., Radcliffe *v.* – – H. L. (E.) 215

Robertson *v.* Nomikos (Petros M.), Ld. – – H. L. (E.) 371

S.

Saadat Kamel Hanum *v.* Attorney-General for Palestine P. C. 508

Schott, Pyrmont, Ld. *v.* – P. C. 145

S. Don Manis Appu, Cadija Umma *v.* – – – P. C. 136

Spain, Government of the Republic of *v.* Arantzazu Mendi, S.S. – – – H. L. (E.) 256

Sutherland Publishing Co., Caxton Publishing Co., Ld. *v.* H. L. (E.) 178

T.

Tan Ma Shwe Zin *v.* Khoo Soo Chong – – – P. C. 527

Tennant *v.* Lord Advocate H. L. (Sc.) 207

Timm (E.) & Son, Ld., Northumbrian Shipping Co., Ld. *v.* H. L. (E.) 397

PAGE

U.

U Ba Yi, Mahant Singh *v.* P. C. 601

Unus Shipping Co., Ld., Vita Food Products, Incorporated *v.* – – – P. C. 277

V.

Vita Food Products, Incorporated *v.* Unus Shipping Co., Ld. – – – – P. C. 277

Vizagapatam Revenue Divisional Officer, Raja Vyricherla Narayana Gajapatiraju *v.* P. C. 302

Vyricherla Narayana Gajapatiraju (Raja) *v.* Vizagapatam Revenue Divisional Officer P. C. 302

W.

Westminster Bank, Farley *v.* H. L. (E.) 430

Westoe & South Shields, St. Hilda, Union of the Benefices of, In re – – – P. C. 269

Wright *v.* New Zealand Farmers Co-Operative Association of Canterbury, Ld. – – P. C. 439

TABLE OF CASES CITED.

A.

		PAGE
Abbott *v.* City of Saint John	40 Can. S. C. R. 597	129
Abdurahim Haji Ismail Mithu *v.* Halimabai	(1915) L. R. 43 I. A. 35	542
Abraham *v.* Abraham	(1863) 9 Moo. I. A. 195	540
Adelaide Electric Supply Co., Ld. *v.* Prudential Assurance Co., Ld.	[1934] A. C. 122	8
Aeneas, The	[1935] P. 128	94
Aeronautics in Canada, Regulation & Control of,	[1932] A. C. 54	123
Alexander *v.* Rayson	[1936] 1 K. B. 169	280
Alps, The	[1893] P. 109	393
Anderson *v.* Equitable Assurance Society of the United States	134 L. T. 557	150
Anderson *v.* Morice	L. R. 10 C. P. 609	456
Anderson, Ld. *v.* Daniel	[1924] 1 K. B. 138	281
Angliss & Co., Australia (Proprietors), Ld. *v.* Peninsular & Oriental Steamship Co.	[1927] 2 K. B. 456	281
Apana Charan Chowdry *v.* Shwe Nu	(1907) 4 L. B. R. 124	534
Ash *v.* Dickie	[1936] Ch. 655	182
—— *v.* Hutchinson & Co.	[1936] Ch. 489	169
Attorney-General *v.* Birmingham, Tame & Rea District Drainage Board	[1912] A. C. 788	7
—— *v.* Dobree	[1900] 1 Q. B. 442	209
—— *v.* Pearson	[1924] 2 K. B. 375	207
—— *v.* Quixley	98 L. J. (K. B.) 315	209
—— *v.* Robinson	[1901] 2 I. R. 67	209
—— for Alberta *v.* Attorney-General for Canada	[1928] A. C. 475	121
—— for British Columbia *v.* Attorney-General for Canada	[1924] A. C. 203	122
—— for British Columbia *v.* Attorney-General for Canada	[1937] A. C. 377	474
—— for Canada *v.* Attorney-General for Ontario	[1937] A. C. 342-345	337
—— for the Dominion of Canada *v.* Attorney-General for the Provinces of Ontario, Quebec & Nova Scotia	[1898] A. C. 700	474
—— for Manitoba *v.* Attorney-General for Canada	[1929] A. C. 260	121
—— for Ontario *v.* Attorney-General for the Dominion	[1896] A. C. 348	130, 473
—— for Ontario *v.* Reciprocal Insurers	[1924] A. C. 328	121
Auckland Corporation *v.* Alliance Assurance Co., Ld.	[1937] A. C. 587	8, 150

B.

		PAGE
Bain, In re	[1930] 1 Ch. 224	432
Baker *v.* Bradford (Earl)	9 B. W. C. C. 436	74
——— *v.* Sutton	1 Keen 224	434
Balwant Rao *v.* Baji Rao	(1920) I. L. R. 48 C. 30	538
Banco de Bilbao *v.* Sancha	[1938] 2 K. B. 176	260
Bank of Ethiopia *v.* National Bank of Egypt	[1937] 1 Ch. 513	261
Bank of Toronto *v.* Lambe	12 App. Cas. 575	118
Barnes *v.* Nunnery Colliery Co.	[1912] A. C. 44	81
Bartonshill Coal Co. *v.* McGuire	3 Macq. 300	217
——————— *v.* Reid	3 Macq. 266	217
Bateson *v.* Gosling	L. R. 7 C. P. 9	601
Beauharnois Light, Heat & Power Co., Ld. *v.* Hydro-Electric Power Commission of Ontario	[1937] O. R. 796	474
Bedouin, The	[1894] P. 1	393
Benaim & Co. *v.* Debono	[1924] A. C. 514	8
Benefices of Great Massingham & Little Massingham, In re	[1931] A. C. 328	269
Bengal Nagpur Rail. Co., Ld. *v.* Ruttanji Ramji	L. R. 65 I. A. 66	114
Bensaude *v.* Thomas & Mersey Marine Insurance Co.	[1897] A. C. 609	372
Biccard *v.* Shepherd	14 Moo. P. C. 471	411
Blair & Co., Ld. *v.* Chilton	8 B. W. C. C. 324	73
Blumberg *v.* Life Interests & Reversionary Securities Corporation	[1897] 1 Ch. 171	109
Bonanza Creek Gold Mining Co., Ld. *v.* The King	[1916] 1 A. C. 566	475
Bonnard *v.* Dott	[1906] 1 Ch. 740	280
Bouillon *v.* Lupton	33 L. J. (C. P.) 37	411
Bowron *v.* Bowron	[1925] P. 187	419
Braby *v.* Donaldson	(1926) S. A. L. R. Sup. Ct. Rep. (App. Div.) 337	183
Bradshaw *v.* Lemon	[1929] N. I. 159	547
Brewers & Maltsters Association of Ontario *v.* Attorney-General for Ontario	[1897] A. C. 231	124
Brierly *v.* Kendall	17 Q. B. 937	182
British Bank for Foreign Trade, Ld. *v.* Russian Commercial & Industrial Bank	38 Times L. R. 65	146
Broken Hill Proprietary Co., Ld. *v.* Broken Hill Municipal Council	[1926] A. C. 94	7
Brooks-Bidlake & Whittall, Ld. *v* Attorney-General for British Columbia	[1923] A. C. 450	122
Burmah Trading Corporation, Ld. *v.* Mirza Mahomed Ally Sherazee	L. R. 5 Ind. App. 139	193
Burr *v.* Theatre Royal, Drury Lane	[1907] 1 K. B. 544	219

C.

Carras *v.* London & Scottish Assurance Corporation, Ld.	[1936] 1 K. B. 291	376
Carter *v.* White	25 Ch. D. 666	601
Caterham Urban District Council *v.* Godstone Rural District Council	[1904] A. C. 171	60

		PAGE
Cedars Rapids Manufacturing & Powder Co. *v.* La Coste	[1914] A. C. 569	302
Celia S. S. *v.* Volturno, S. S.	[1921] 2 A. C. 544	149
Chan Pyu *v.* Saw Sin	(1928) I. L. R. 6 R. 623	535
Charles *v.* Taylor, Walker & Co.	3 C. P. D. 492	218
Charlesworth *v.* Mills	[1892] A. C. 231	261
Chatenay *v.* Brazilian Submarine Telegraph Co., Ld.	[1891] 1 Q. B. 79	10, 283
Chesterman's Trusts, In re. Mott *v.* Browning	[1923] 2 Ch. 466	146
Chinery *v.* Viall	5 H. & N. 288	182
Clark (James) *v.* Sree Mutty Doorgamoney Dossee	3 Moo. P. C. 252	282
Cochran & Son *v.* Leckie's Trustee	(1906) 8 F. 975	455
Cohn *v.* Boulken	36 Times L. R. 767	149
Coker *v.* Bolton	[1912] 3 K. B. 315	376
Coldrick *v.* Partridge, Jones & Co.	[1910] A. C. 77	244
Commercial Bank of Tasmania *v.* Jones	[1893] A. C. 313	601
Compania Naviera Vascongado *v.* Cristina S.S.	[1938] A. C. 485	164, 260
Conquest *v.* Ebbetts	[1896] A. C. 490	547
Corea *v.* Appuhamy	[1912] A. C. 230; 15 C. N. L. R. 65	136
Corrie *v.* MacDermott	[1914] A. C. 1056	306
Cox *v.* Dublin City Distillery Co.	[1917] 1 I. R. 203	10
Crédit Foncier Franco-Canadien *v.* Ross and Attorney-General for Alberta	[1937] 2 W. W. R. 353	474
Cristina, The	[1938] A. C. 485	164, 260
Crowley *v.* Cohen	3 B. & Ad. 478	457
Curran & Co. *v.* Kays	[1928] 2 K.B. 469	592
Cutchi Memon Case	(1847) Perry's Oriental Cases, 110	539

D.

Dal Muhammad *v.* Sain Das	A.I.R. (1927) Lah. 396	601
Deere (John) Plow & Co., Ld. *v.* Wharton	[1915] A. C. 330	129, 474
De Forest *v.* Fulton Fire Insurance Co.	(1828) N. Y. Rep., 1 Hall, 94	457
De Vitré *v.* Betts	L. R. 6 H. L. 319	198
Dobell *v.* Steamship Rossmore Co.	[1895] 2 Q. B. 408	277
Donaldson Bros. *v.* Cowan	1909 S. C. 1292	592
Donoghue *v.* Stevenson	[1932] A. C. 562	280
Duff Development Co. *v.* Kelantan Government	[1924] A. C. 797	260
Dunne *v.* Byrne	[1912] A. C. 407	432

E.

Ebsworth *v.* Alliance Marine Insurance Co.	L. R. 8 C. P. 596	453
Elder, Dempster & Co. *v.* Paterson, Zochonis & Co., Ld.	[1924] A. C. 522	278
Elderslie Steamship Co. *v.* Borthwick	[1905] A. C. 93	338
Evans, Sons & Co. *v.* Cunard Steamship Co.	18 Times L. R. 374	562
Exchange Schooner *v.* McFaddon	7 Cranch, 116	161
Express Engineering Works, Ld., In re	[1920] 1 Ch. 466	618

F.

		PAGE
Farwell *v.* Boston & Worcester Ry. Corporation	4 Metcalf, 49; 3 Macq. 316	221
Feist *v.* Société Intercommunale Belge d'Electricité	[1934] A. C. 161	2
Feret *v.* Hill	15 C.B. 207	280
Fone Lan *v.* Ma Gyee	(1903) 2 L. B. R. 95	534
Forbes *v.* Attorney-General for Manitoba	[1937] A. C. 260	129
Foster *v.* Driscoll	[1929] 1 K. B. 470	281
———*v.* Oxford, etc., Ry. Co.	13 C. B. 200	613
Fraser *v.* Fraserville (City of)	[1917] A. C. 187	302
Frenkel *v.* MacAndrews & Co.	[1929] A. C. 545	562

G.

Gabriel (Thomas) & Sons *v.* Churchill & Sim	[1914] 3 K. B. 1272	109
Gardner *v.* Jay	29 Ch. D. 50	501
Gibbs & Sons *v.* La Société Industrielle et Commerciale des Métaux	25 Q. B. D. 399	8
Gibson & Co. *v.* Wishart	[1915] A. C. 18	592
Glass *v.* Inland Revenue	1915 S. C. 449	302
Glynn *v.* Margetson & Co.	[1893] A. C. 351	562
Godstone Rural District Council *v.* Croydon Corporation	102 L. J. (K. B.) 34	55
Gough and The Aspatria, Silloth & District Joint Water Board, In re	[1903] 1 K. B. 574; [1904] 1 K. B. 417	302, 305
Grant *v.* Grant	L. R. 5 C. P. 727	570
Great Massingham and Little Massingham, Benefices of, In re	[1931] A. C. 328	269
Great West Saddlery Co., Ld. *v.* The King	[1921] 2 A. C. 91	129
Greening *v.* Wilkinson	1 C. & P. 625	203
Greenock Steamship Co. *v.* Maritime Insurance Co.	[1903] 1 K. B. 367; [1903] 2 K. B. 657	399
Grein *v.* Imperial Airways, Ld.	[1937] 1 K. B. 50	333

H.

Hain Steamship Co. *v.* Tate & Lyle, Ld.	41 Com. Cas. 350	281, 574
Hajarimal *v.* Krishnarav	(1881) I. L. R. 5 Bom. 647	601
Haliartus, The	31 Ll. L. Rep. 185	94
Hamlyn & Co. *v.* Talisker Distillery	[1894] A. C. 202	10
Harland & Wolff *v.* Burns	1931 S. C. 722	278
Harris *v.* Harris	15 L. T. 448	419
Hedley *v.* Pinkney	[1894] A. C. 222	249
Henderson *v.* Henderson	3 Hare, 100	20
Hodson's Settlement, In re	[1938] Ch. 916	209
Hong Ku *v.* Ma Thin	(1881) L. B. Selected Judgments, 135	533
Hoop, The	4 C. Rob. 145	260
Howard de Walden (Lord) *v.* Barber	19 Times L. R. 183	547
Howlett *v.* Tarte	10 C. B. (N. S.) 813	6
Hoystead *v.* Taxation, Commissioner of	[1926] A. C. 155	2
Humphries *v.* Humphries	[1910] 2 K. B. 531	6
Hunt *v.* Chambers. In re Martin	20 Ch. D. 365	501
Hutchinson *v.* York, Newcastle & Berwick Ry. Co.	5 Ex. 343	217
Hyams *v.* Stuart King	[1908] 2 K. B. 696	281

I.

		PAGE
Income Tax Commissioners *v.* Pemsel	[1891] A. C. 531	432
Independent Order of Foresters *v.* The King	(1939) 1 W. W. R. 275	475
Industrie, The	[1894] P. 58	278
Inland Revenue Commissioners *v.* Clay	[1914] 1 K. B. 339	302
Inland Revenue *v.* Scott's Trustees	1918 S. C. 720	209
Insurance Act of Canada, In re	[1932] A. C. 41	121
Irish Land Commission *v.* Ryan	[1900] 2 I. R. 565	6
Irving *v.* Commercial Banking Co. of Sydney	19 N. S. W. R. Eq. 54	439

J.

Jackson *v.* Union Marine Insurance Co., Ld.	L. R. 10 C. P. 125	386
Jacobs, Marcus & Co. *v.* Crédit Lyonnais	12 Q. B. D. 589	7, 277
James *v.* Allen	3 Mer. 17	434
Jamieson & Newcastle Steamship Freight Insurance Association	[1895] 2 Q. B. 90	377
John Deere Plow Co., Ld. *v.* Wharton	[1915] A. C. 330	129, 474
John Lane *v.* Associated Newspapers	[1936] 1 K. B. 715	205
Johnson *v.* Lindsay	[1891] A. C. 371	246
———— *v.* Stear	15 C. B. (N. S.) 330	182
Jones *v.* Meiros Colliery Co.	19 B. W. C. C. 182	592
Jowal Buksh *v.* Dharum Singh	(1866) 10 Moo. I. A. 511	540
Joyner *v.* Weeks	[1891] 2 Q. B. 31	547
Judges *v.* Attorney-General of Saskatchewan	[1937] 2 D. L. R. 209	129

K.

Kaltenbach *v.* Mackenzie	3 C. P. D. 467	376
Karamea, The	[1922] 1 A. C. 68	104
Kaye *v.* Croydon Tramways Co.	[1898] 1 Ch. 358	617
Kearney *v.* Whitehaven Colliery Co.	[1893] 1 Q. B. 700	278
Keen *v.* St. Clement's Press, Ld.	7 B. W. C. C. 542	73
Kerr *v.* Dunlop (James) & Co.	[1926] A. C. 377	92
Khatubai *v.* Mahomed Haji Abu	(1922) L. R. 50 I. A. 108	542
Kish (J. & E.) *v.* Taylor (Charles) Sons & Co.	[1912] A. C. 604	402
Knowles *v.* Southern Rail. Co.	[1937] A. C. 463	74
Krishto Kishori Chowdhrain *v.* Radha Romun Munshi	(1885) I. L. R. 12 Cal. 330	601
Kulukundis *v.* Norwich Union Fire Insurance Society	[1937] 1 K. B. 1	380
Kyin Wet *v.* Ma Gyók	(1918) 9 L. B. R. 179	528

L.

Lancashire & Yorkshire Ry. Co. *v.* Highley	[1917] A. C. 352	74
———— *v.* MacNicoll	88 L. J. (K. B.) 601	181

		PAGE
Lane (John) *v.* Associated Newspapers	[1936] 1 K. B. 715	205
Leduc & Co. *v.* Ward	20 Q. B. D. 475	562
Liverpool Borough Bank *v.* Turner	2 De G. F. & J. 502	278
Liverpool & Great Western Steam Co. *v.* Phœnix Insurance Co.	(1889) 129 U. S. 397	277, 278
Livingstone *v.* Rawyards Coal Co.	5 App. Cas. 25	182
Lochgelly Iron, &c., Co. *v.* M'Mullan	[1934] A. C. 1	247
Lodge *v.* National Union Investment Co., Ld.	[1907] 1 Ch. 300	280
London & North Western Ry. Co. *v.* Glyn	1 El. & Bl. 652	456
——— *v.* Hudson (Richard) & Sons, Ld.	[1920] A. C. 324	280
Lovell & Howell	1 C. P. D. 161	218
Lucas *v.* Chesterfield Gas & Water Board	[1908] 1 K. B. 571; [1909] 1 K. B. 16	302, 305
Lucena *v.* Craufurd	2 Bos. & Pul. (N. R.) 269	455
Luther *v.* Sagor	[1921] 3 K. B. 532	259

M.

Ma Pwa *v.* Yu Lwai	(1916) 8 L. B. R. 404	528
Ma Sein *v.* Ma Pan Nyun	(1924) I. L. R. 2 R. 94	528
Ma Sein Byu *v.* Khoo Soon Thye	(1933) I. L. R. 11 R. 310	528
Ma Tin *v.* Doop Raj Barna	Chan-Toon L. C. vol. 1, 370 at 372	527
Ma Yin Mya *v.* Tan Yauk Pu, In re	(1927) I. L. R. 5 R. 406	534
Macaskill *v.* Macaskill	1939 S. C. 187	421
MacBeth *v.* Ashley	L. R. 2. H. L. (Sc.) 352	121
McCarthy *v.* Abel	5 East, 388	395
Macdonald *v.* Riordan	(1899) Q. R. 8 Q. B. 555; 30 S. C. R. Can. 619	613
McFadden *v.* Blue Star Line	[1905] 1 K. B. 697	411
Macgregor, In re. Thompson *v.* Ashton	(1932) 32 New South Wales Rep. 483	432
McIver & Co., Ld. *v.* Tate Steamers & Co.	[1903] 1 K. B. 362	403
MacKenzie *v.* Whitworth	L. R. 1 Ex. D. 36	452
M'Naughton *v.* Caledonian Ry. Co.	(1857) 19 D. 271	227
Mah Nhin Bwin *v.* U. Schwe Gone	(1914) L. R. 41 I. A. 121	528
Mahmoud *v.* Ispahani	[1921] 2 K. B. 716	281
Mahomed Syedol Ariffin *v.* Yeoh Ooi Gark	[1916] 2 A. C. 575	512
Mailathi Anni *v.* Subbaraya Mudaliar	(1901) I. L. R. 24 M. 650	542
Man Han *v.* R. M. A. L. Firm	(1926) I. L. R. 4 R. 110; (1927) I. L. R. 5 R. 443	534, 535
Marais, Ex parte. The Queen *v.* Marais, In re	[1902] A. C. 51	487
Martin, In re. Hunt *v.* Chambers	20 Ch. D. 365	501
Massie & Renwick *v.* Underwriters Survey Bureau	(1937) S. C. R. 265	181
Maung Dwe *v.* Khoo Haung Shein	(1924) L. R. 52 I. A. 73	528
Maung Po Maung *v.* Ma Pyit Ya	(1923) I. L. R. 1 R. 161	528
Mediana, The	[1900] A. C. 113	192
Missouri Steamship Co., In re	42 Ch. D. 321	278
Mohini Mohan Banerjee *v.* Secretary of State for India	(1921) 25 C. W. N. 1002	304
Montreal City *v.* Montreal Harbour Commissioners	[1926] A. C. 299	618

		PAGE
Moonshee Buzloor Ruheem *v.* Shumsoonnissa Begum	(1867) 11 Moo. I. A. 551	539
Morgan *v.* Vale of Neath Ry. Co.	5 B. & S. 570, 736; L. R. 1 Q. B. 149	218, 220, 234
Morrison & Co. *v.* Shaw Savill & Albion Co.	[1916] 2 K. B. 783	565
Mott *v.* Browning. In re Chesterman's Trusts	[1923] 2 Ch. 466	146
Moulis *v.* Owen	[1907] 1 K. B. 746	10
Mount Albert Borough Council *v.* Australasian Temperance & General Mutual Life Assurance Society, Ld.	[1938] A. C. 224	10
Muhammad Ibrahim Rowther *v.* Shaik Ibrahim Rowther	(1922) I. L. R. 45 M. 308	542
Murugappa Mudaliar *v.* Minor Munusami Mudali	(1920) 38 M. L. J. 131	601
Muzaffer Bey *v.* Collet (W.)	(1904) 6 Cyprus L. R. 108	508

N.

Nankivel *v.* Omsk All-Russian Government	142 North Eastern Reporter, 569	262
Narasingh Das *v.* Secretary of State for India	L. R. 52 I. A. 133	305
Neilson *v.* Betts	L. R. 5 H. L. 1	180
Nelson Line *v.* Nelson & Sons, Ld.	[1908] A. C. 16	338
North British Insurance Co. *v.* Moffatt	L. R. 7 C. P. 25	453
Nur Din *v.* Allah Ditta	(1932) I. L. R. 13 Lah. 817	601

O.

Oakley *v.* Lyster	[1931] 1 K. B. 148	181
Odlum *v.* Vancouver (City of)	85 L. J. (P. C.) 95; 113 L. T. 795	305
Ohin Moore *v.* Taye (A.)	1 W. A. C. A. 242	500
Oriental Financial Corporation *v.* Overend Gurney & Co.	L. R. 7 Ch. 142	601
Ossalinsky (Countess) *v.* Manchester Corporation	Reported in Browne & Allan on Compensation, 2nd ed., Appendix, p. 659	305
Otranto, The	[1931] A. C. 194	103
Ottawa Valley Power Co. *v.* Hydro-Electric Power Commission	[1937] O. R. 265	474
Ottoman Bank of Nicosia *v.* Chakarian	[1938] A. C. 260	151
Overend & Gurney Co. *v.* Gibb	L. R. 5 H. L. 480	110

P.

Pape *v.* Westacott	[1894] 1 Q. B. 272	109
Parbali Kumari Debi *v.* Jagadis Chunder Dhabal	(1902) I. L. R. 29 C. 433	538
Parlement Belge, The	5 P. D. 197	163
Parr's Banking Co., Ld. *v.* Yates	[1898] 2 Q. B. 460; 67 L. J. (Q. B.) 851	440
Paterson Steamships, Ld. *v.* Canadian Co-Operative Wheat Producers, Ld.	[1934] A. C. 538	279, 402
Performing Right Society, Ld. *v.* Bray Urban District Council	[1930] A. C. 377	24

		PAGE
Perry *v.* Equitable Life Assurance Society of United States	45 Times L. R. 468	9
Peru, Republic of *v.* Peruvian Guano Co.	36 Ch. D. 489	261
Peruvian Guano Co., Ld. *v.* Dreyfus Brothers & Co.	[1892] A. C. 166	182
Petrel, The	3 Hagg. Adm. 299	260
———	[1893] P. 320	215, 230
Pham Tiyok's Case	(1930) I. L. R. 8 R. 57	536
Plumb *v.* Cobden Flour Mills Co.	[1914] A. C. 62	78
Pollard *v.* Herries	3 Bos. & P. 335	149
Powell *v.* Main Colliery Co.	[1900] A. C. 366	593
Priestley *v.* Fowler	3 M. & W. 1	224
Proprietary Articles Trade Association *v.* Attorney-General for Canada	[1931] A. C. 310	123, 474
Public Trustee *v.* Wallace	(1932) N. Z. L. R. 625	443

Q.

Quilter *v.* Mapleson	9 Q. B. D. 672	33

R.

Rajah Deedar Hossein *v.* Ranee Zuhoor-oom Nissa	(1841) 2 Moo. I. A. 441	537, 538
Ralli Brothers *v.* Compañia Naviera Sota Y Aznar	[1920] 1 K. B. 614; 2 K. B. 287	7, 8, 277
Ranjit Singh *v.* Naubat	(1902) I. L. R. 24 All. 504	601
Rankin *v.* Potter	L. R. 6 H. L. 83	375
Reed *v.* Great Western Rail Co.	[1909] A. C. 31	91
Reg. *v.* Marais, In re. Ex parte Marais	[1902] A. C. 51	487
Reid *v.* Fairbanks	13 C. B. 692	193
Rendsberg, The	6 C. Rob. 144	261
Rex *v.* International Bondholders	[1937] A. C. 500	6, 277
—— *v.* Minister of Health	[1921] 1 K. B. 1	61
Robinson *v.* Bland	1 Wm. Bl. 234	10
Rockingham, Sisters of Charity of *v.* The King	[1922] 2 A. C. 315	304
Rose *v.* Ford	[1937] A. C. 826	255
Rouquette *v.* Overmann	L. R. 10 Q. B. 525	10
Roura & Forgas *v.* Townend	[1919] 1 K. B. 189	372
Routh *v.* Thompson	11 East 428; 13 East 274	456
Royal Bank of Canada *v.* Rex	[1913] A. C. 115	474
Royal Exchange Shipping Co. *v.* Dixon & Co.	12 App. Cas. 11	566
Royal Trust Co. (Shell Estate) *v.* Attorney-General for Alberta	[1937] 1 W. W. R. 376	473
Russell *v.* Palmer	2 Wils. 325	106
——— *v.* The Queen	7 App. Cas. 829	129
Russian Bank for Foreign Trade *v.* Excess Insurance Co., Ld.	[1918] 2 K. B. 123	394
Russian Commercial & Industrial Bank *v.* British Bank for Foreign Trade, Ld.	[1921] 2 A. C. 438	151
Rutcheputty Dutt Tha *v.* Rajunder Narain Rae	(1839) 2 Moo. I. A. 132	538

S.

		PAGE
Sadashio Rao *v.* Umaji	(1925) 23 Nag. 79	603
Sankana Kalana *v.* Virupakshapa Ganeshapa	(1883) I. L. R. 7 Bom. 146	601
Schoales, In re	[1930] 2 Ch. 75	433
Schooner Exchange *v.* M'Faddon	7 Cranch, 116	161
Scottish Marine Insurance Co. of Glasgow *v.* Turner	1 Macq. 334	395
Secretary of State for Foreign Affairs *v.* Charlesworth Pilling & Co.	[1901] A. C. 373	305
Sewell *v.* Burdick	10 App. Cas. 74	281
Sharp Bros. *v.* Knight	25 B. W. C. C. 86	592
Sheikh Mahmud ed Dajani *v.* Shafiqah Abder Es Sadiq	Collection of Judgments of the Courts of Palestine, Vol. V., 1918–1933, pp. 1850, 1856	514
Sheikh Sadek Anabtawi *v.* Fares Ahmad	(1928) L. R. of Palestine (1920–1933), 269	512
Sidney *v.* North Eastern Ry. Co.	[1914] 3 K. B. 629	302
Simpson *v.* Bloss (or Bliss)	7 Taunt, 246	281
Smith *v.* Baker	L. R. 8 C. P. 350	199
——— *v.* Baker & Sons	[1891] A. C. 325	218
——— *v.* Steele	L. R. 10 Q. B. 125	247
Soorendronath Roy *v.* Heeramonee Burmoneah	(1868) 12 Moo. I. A. 81	538
Spencer's Case	5 Co. Rep. 16*a*	560
Stephen *v.* Cooper	[1929] A. C. 570	72
Stockdale *v.* Dunlop	6 M. & W. 224	456
Stovin *v.* Fairbrass	88 L. J. (K. B.) 1004	33
Stratton, In re	[1931] 1 Ch. 197	433
Subramania Aiyar *v.* Gopala Aiyer	(1909) I. L. R. 33 Mad. 308	601
Suse *v.* Pompe	8 C. B. (N. S.) 538	149
Swainson *v.* North Eastern Ry. Co.	3 Ex. Div. 341	218
Swarma Manjuri Dassi *v.* Secretary of State for India	I. L. R. 55 Cal. 994	304

T.

Talbot *v.* Vickers	[1925] 2 K. B. 682	592
Tan Ma Shwe Zin *v.* Tan Ma Ngwe Zin	(1932) I. L. R. 10 R. 97	530
Tasmania, The	15 App. Cas. 223	103
Taylor *v.* Chester	L. R. 4 Q. B. 309	283
Tennant *v.* Union Bank of Canada	[1894] A. C. 31	474
Thein Shin *v.* Ah Shein	(1914) 8 L. B. R. 222	528
Thin *v.* Richards & Co.	[1892] 2 Q. B. 141	399
Thomas *v.* Ocean Coal Co.	[1933] A. C. 100	74
——— *v.* Thomas	[1924] P. 194	419
Thomas Gabriel & Sons *v.* Churchill & Sim	[1914] 3 K. B. 1272	109
Thompson *v.* Ashton. In re Macgregor	(1932) 32 New South Wales Rep. 483	432
Thurston *v.* Thurston	26 Times L. R. 388	419
Tidy *v.* Battman	[1934] 1 K. B. 319	101
Tillekeratne *v.* Bastian	21 C. N. L. R. 12	136
Torni, The	[1932] P. 78	278
Toronto Corporation *v.* York Corporation	[1938] A. C. 415	475
Tozeland *v.* West Ham Union	[1906] 1 K. B. 538	247
Trent-Stoughton *v.* Barbados Water Supply Co., Ld.	[1893] A. C. 502	307

		PAGE
Trinidad Shipping Co. *v.* Alston (G. R.) & Co.	[1920] A. C. 888	278
Trotter *v.* Maclean	13 Ch. D. 574	182
Tucknott *v.* East Sussex County Council	28 B. W. C. C. 42	74, 75
Tunno & Edwards	12 East, 488	375
Turnbull, Martin & Co. *v.* Hull Underwriters' Association, Ld.	[1900] 2 Q. B. 402	393, 394

U.

Union Colliery Company of British Columbia, Ld. *v.* Bryden	[1899] A. C. 580	123
United Kingdom Mutual Steamship Assurance Association, Ld. *v.* Boulton	3 Com. Cas. 330	396

V.

Valin *v.* Langlois	5 App. Cas. 115	474
Vallabhdas Naranji (Khot of Kanjor) *v.* Collector under Act 1 of 1894	[1929] 33 C. W. N. 549	305
Vickers-Armstrongs *v.* Regan	[1933] 1 K. B. 232	590
Victorian Daylesford Syndicate, Ld. *v.* Dott	[1905] 2 Ch. 624	280
Vidya Varuthi Thirtha *v.* Balusami Ayyar	L. R. 48 I. A. 302	511
Vortigern, The	[1899] P. 140	397
Vose *v.* Lancashire & Yorkshire Ry. Co.	27 L. J. Ex. 249; 2 H. & N. 728	226

W.

Waller *v.* South Eastern Ry. Co.	2 H. & C. 102	218
Waring (Lord) *v.* London & Manchester Assurance Co.	[1935] 1 Ch. 310	443
Waters *v.* Monarch Life Assurance Co.	5 El. & Bl. 870	453
Webb *v.* Hewitt	3 K. & J. 438	601
Westminster Bank, Ld. *v.* Imperial Airways	52 Times L. R. 607; 155 L. T. 86; 55 Ll. L. Rep. 242	338
Wheatear, The	3 Ll. L. Rep. 229	100
Williams *v.* Evans	L. R. 1 Q. B. 352	109
Wilson *v.* Merry	L. R. 1 H. L. (Sc.) 326	249
Wilsons & Clyde Coal Co. *v.* English	[1938] A. C. 57	219
Wilsons & Clyde Coal Co., Ld. *v.* M'Ferrin	[1926] A. C. 377	92
Wiltshire *v.* Sims	1 Camp. 258	109
Wulfsohn *v.* Russian Socialist Federated Soviet Republic	138 Northeastern Reporter, 24	262

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

NEW BRUNSWICK RAILWAY COMPANY . . . . APPELLANTS;

AND

BRITISH AND FRENCH TRUST CORPORATION, LIMITED . . . . RESPONDENTS.

H. L. (E.)*
1938
Oct. 17, 18, 20, 21, 24, 25; *Dec.* 13.

Contract—Bond—Gold clause—Estoppel—Proper law of contract—Effect of new legislation.

The appellant railway company, which was incorporated in New Brunswick, issued in 1884, under statutory authority, a series of mortgage bonds by each of which the company promised to pay to the bearer or the registered holder on August 1, 1934, "the sum of one hundred pounds sterling gold coin of Great "Britain of the present standard of weight and fineness at its "agency in the City of London, England, with interest thereon "at the rate of five pounds sterling per centum per annum, "payable semi-annually on the first days of February and "August in each year in the said City of London or, at the "option of the holder, at the office of the company in New "Brunswick on presentation and surrender of the interest

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* *Present:* LORD MAUGHAM L.C., LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

H. L. (E.)

1938

NEW BRUNSWICK RY. CO.
v.
BRITISH AND FRENCH TRUST CORPORATION.

" warrants or coupons hereto annexed as they severally become " due." Attached to each bond was a coupon stating that the company " will pay the bearer two pounds ten shillings stg. " at its agency, in the City of London, England or at its office " in New Brunswick, ... being six months' interest on its " first mortgage bond " :—

Held, applying the construction laid down in *Feist* v. *Société Intercommunale Belge d'Electricité* [1934] A. C. 161, that the gold clause in the bonds was intended to protect the holders against a depreciation of the currency, and, therefore, that the respondents, as holders of some of the bonds, were entitled to receive in respect of each of them such a sum as represented the price in London in sterling of 12,327·447 grains of gold of the standard of fineness specified in Sch. 1 of the Coinage Act, 1870, but that in view of the language of the coupons the *Feist* construction was not applicable to them and, therefore, that the respondents were only entitled to receive, on presentation of the coupons, a sum in sterling as indicated thereon.

At a date after the hearing of the action by the respondents in the King's Bench Division, the Canadian Legislature passed the Gold Clauses Act, 1937, by s. 4 of which it was provided that " in the case of any gold clause obligation governed by the " law of Canada payable in Canada or elsewhere, in money other " than money of Canada, tender of the nominal or face amount " of the obligation in currency which is legal tender, for the " payment of debts in the country in the money of which the " obligation is payable shall be a legal tender, and the debtor " shall, on making payment in accordance with such a tender, " be entitled to a discharge of the obligation."

Held, that this provision could have no retrospective effect, and could not diminish or destroy the right of English creditors who had, prior to the passing of the Act, commenced an action on the bonds in this country.

In a previous action on one bond of the same series by the respondents against the appellants, the latter did not enter an appearance and judgment was obtained against them by default.

Held, that such a judgment did not operate an estoppel to prevent the appellants raising as a defence to the present action questions as to the construction of the bonds, though these were couched in the same terms as the bond upon which judgment was obtained by default.

Per Lord Maugham L.C. In the case of a judgment in default of appearance, a defendant is only estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment.

Quaere, whether the language in the judgment in *Hoystead* v. *Commissioner of Taxation* [1926] A. C. 155, 170, that " if in any " court of competent jurisdiction a decision is reached, a party " is estopped from questioning it in a new legal proceeding. But " the principle also extends to any point, whether of assumption " or admission, which was in substance the ratio of and "fundamental to the decision" applies to the case of a judgment on a claim under contract A followed by an action under a similarly worded contract B.

Per Lord Maugham L.C. and Lord Russell of Killowen. It is undesirable that judges should make declarations as to the true construction of documents on motions for judgment in default of defence.

Decision of Court of Appeal affirmed on the construction of the bonds but reversed on the construction of the interest coupons.

Appeal from a decision of the Court of Appeal.

The appellants, the New Brunswick Railway Company, were incorporated by an Act of the New Brunswick Legislature in 1870, and were by an Act of the Dominion Legislature of 1881 empowered to issue mortgage bonds. In 1884 they issued a large number of these bonds by the terms of which they promised to pay to the bearer or registered holder on August 1, 1934, "the sum of one hundred pounds sterling of "gold coin of Great Britain of the present standard of weight "and fineness at its agency in the City of London, England, "with interest thereon at the rate of five pounds sterling per "centum per annum semi-annually on February 1 and "August 1 in each year in the said City of London or, at the "option of the holder, at the office of the company in New "Brunswick on presentation and surrender of the interest "warrants or coupons hereto annexed as they severally become "due." The bonds were secured by a first mortgage or deed of trust executed by the company to the Central Trust Company of New York as trustee, covering its railway and other property. Attached to each bond was a coupon in these terms: "£2 10s. "Stg. No. 100. New Brunswick Railway Company will pay "the bearer Two pounds ten shillings stg. at its agency, in "the City of London, England, or at its office in New Bruns-"wick, on the first day of . . . . , being six months' interest "on its First Mortgage Bond No. . . . ."

The present action concerned 992 of these bonds which were bought by the respondents on August 15, 1934, that is, after the date when the principal fell due for payment. At an earlier date, however, they had bought one bond, and on August 20, 1934, they issued a writ claiming the following

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.

relief in respect thereof: (1.) a declaration that upon its true construction the respondents (the plaintiffs in the action) were entitled to receive from the appellants (the defendants in the action) (*a*) such a sum as represented the price in London in sterling of 12,327·447 grains of gold of the standard of fineness specified in Schedule 1 of the Coinage Act, 1870; and (*b*) half-yearly interest thereunder on August 1, 1934, a sum equal to 2½ per cent. of the amount specified in (*a*) above, less income tax; (2.) payment of the sums due to the respondents in accordance with the foregoing declaration, with interest; and (3.) alternatively, damages for breach of the appellants' promise to pay the sum of 100*l.* sterling gold coins of the standard of weight and fineness existing on August 1, 1884, together with half-yearly interest thereon at 5 per cent.

Leave to serve the writ in that action out of the jurisdiction was obtained, but the appellants did not enter an appearance, and thereafter judgment was entered for the respondents, it being adjudged and declared "that upon the true construction "of the bond . . . . the plaintiffs are entitled as holders "thereof to receive from the defendants (A) by way of the "principal due thereunder on August 1, 1934, such sum as "represents the price in London in sterling (calculated as on "that day) of 12,327·447 grains of gold of the standard of "fineness specified in the First Schedule to the Coinage Act, "1870, and (B) by way of the half-yearly interest due there"under on the said 1st day of August, 1934, a sum equal "to 2½ per cent. of the amount specified in (A) above less "income tax."

On March 20, 1935, the respondents issued the writ in the present action claiming a declaration in the terms set out above. By their defence the appellants contended that they were entitled to discharge their obligation by tendering 100*l.* sterling for each bond with interest (less income tax) at 5 per cent. in legal tender.

By their reply the respondents pleaded that the appellants were estopped by the judgment above referred to from raising their present contention.

The action was tried by Hilbery J., who by his judgment

H. L. (E.)
1938
NEW BRUNSWICK RY. CO. v. BRITISH AND FRENCH TRUST CORPORATION.

dated January 16, 1936, held that upon the proper construction of the bonds and attached interest coupons the appellants were entitled to discharge their liability in respect of principal and interest by paying the nominal amount of currency called for by the bonds, and that the appellants were not estopped from contending for this construction; he accordingly dismissed the action with costs.

The respondents appealed to the Court of Appeal, but before the appeal came on for hearing Canada passed the Gold Clause Act, 1937, which by s. 4 provided as follows: "In the case of "any gold clause obligation governed by the law of Canada "payable in Canada or elsewhere, in money other than money "of Canada, tender of the nominal or face amount of the "obligation in currency which is legal tender for the payment "of debts in the country in the money of which the obligation "is payable shall be a legal tender and the debtor shall, on "making payment in accordance with such a tender, be "entitled to a discharge of the obligation." The appellants applied for leave, and leave was granted, to raise the question whether they were not in any event by reason of this legislation entitled to discharge their obligations under the bonds and interest coupons by paying the nominal amount thereof. The appeal was thereafter heard and allowed, the Court holding that the present respondents were entitled to receive in respect of each bond such a sum as represented the price in London on August 1, 1934, in sterling (calculated as on that day) of 12,327·447 grains of gold of the standard claimed, and also by way of half-yearly interest a sum equal to 2½ per cent. of the amount, less income tax. With regard to the Canadian legislation of 1937, each member of the Court of Appeal thought that its effect was avoided, on the ground (as stated by Greer and Scott L.JJ.) that the law of England, which was the lex loci solutionis, affected not merely the mode of performance but also its measure and the interpretation of the obligation for payment, or on the ground (as expressed by Slesser L.J.) that the Canadian Act "did not affect the substance of the "obligations."

The appellants appealed to this House.

F. R. Evershed K.C. and *Valentine Holmes* for the appellants. The first question is whether as a matter of construction the debtors can obtain a discharge by paying what is legal tender of the nominal sum in London. The Court of Appeal has negatived that submission and held that the proper law of the contract is the law of Canada, but that so far as payment is concerned, the proper law is English, which law also measures the obligation. All the incidents connected with the issue of the bonds are Canadian and therefore Canadian law applies. Each one of the matters relied upon in *Feist* v. *Société Intercommunale Belge d'Electricité* (1) is absent in this case. In *Rex* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* (2) Lord Atkin pointed out that the proper law of the contract in that case was the law of the United States and that the claim by the suppliants to be paid in America a larger sum than the nominal sum failed.

Secondly, it is said against us that a default judgment can operate an estoppel. For a judgment to operate an estoppel it must appear on the face of the record that the point was the same in both proceedings. That condition is not satisfied in this case. In *Howlett* v. *Tarte* (3) Willes J. said that "nobody "ever heard of a defendant being precluded from setting up "a defence in a second action because he did not avail himself "of the opportunity of setting it up in the first action." Again, in *Irish Land Commission* v. *Ryan* (4) it was said that a default judgment might operate as an estoppel, but the ground and extent of that estoppel must be found on the face of that judgment itself, and cannot be inferred or deduced from the pleadings of the party who has obtained the judgment where the defendant has said nothing, and has merely allowed judgment to go by default. In *Humphries* v. *Humphries* (5) Farwell L.J., who delivered the judgment of the Court, said: "It is, we think, clear that Williams J. in *Howlett* v. *Tarte* (3) "intended his question to be answered, as counsel answered it, "in the negative; it was as follows: 'Suppose a defendant in

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(1) [1934] A. C. 161.
(2) [1937] A. C. 500.
(3) (1861) 10 C. B. (N. S.) 813, 821, 827.
(4) [1900] 2 I. R. 565.
(5) [1910] 2 K. B. 531, 536.

" 'an action for an instalment due on a bond, set up a release " 'or coverture, and issue taken upon it, and found against " 'the defendant, the doctrine of estoppel would prevent that " 'defence being set up in an action for a second instalment. " 'But suppose the defendant neglected to set up the defence in " 'the first action, would she be precluded from relying on it " 'in the second action ?' Counsel answered 'Clearly not.' "This" continued Farwell L.J., "is in accordance with justice " . . . . it is not expedient that litigants should be deprived of "independent defences through oversight, when the matter "can again be properly raised in Court." We submit that Williams J. expressed the true view in *Howlett* v. *Tarte* (1), namely, that even assuming that a judgment by default can operate an estoppel, it only precludes the defendant setting up a plea inconsistent with any traversable allegation in the former action. [They also referred on this point to *Broken Hill Proprietary Co., Ld.* v. *Broken Hill Municipal Council* (2) and *Hoystead* v. *Commissioner of Taxation.* (3)]

The third question is as to the effect of Canadian legislation passed between the date of Hilbery J.'s judgment and the decision of the Court of Appeal. As an appeal is a rehearing, we submit that the Court of Appeal could, and ought, to have given such a judgment as Hilbery J. would have given if that legislation had been before him: see *Attorney-General* v. *Birmingham, Tame and Rea District Drainage Board.* (4) Here the contract being, as we contend, a Canadian one, s. 4 of the Gold Clauses Act, 1937, applies, which says that payment of the nominal amount shall be a good discharge. In *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (5) it was said that the subject-matter as well as the residence of the contracting parties or the place where the contract is made must be looked at. Here the contract was made in Canada, and its subject-matter was Canadian. Even if the contract is considered to be English but parts of it have to be performed in Canada, the law of Canada is to be applied: see per Bailhache J. in *Ralli Brothers*

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(1) 10 C. B. (N. S.) 813, 821, 827.
(2) [1926] A. C. 94.
(3) [1926] A. C. 155.
(4) [1912] A. C. 788.
(5) (1884) 12 Q. B. D. 589.

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.

v. *Compañia Naviera Sota Y Aznar* (1) which was affirmed in the Court of Appeal. (2) See further *Benaim & Co.* v. *Debono.* (3) In *Adelaide Electric Supply Co., Ld.* v. *Prudential Assurance Co., Ld.* (4)—an English company—it was held that where by agreement between the parties the dividends were to be paid in Australia, the company discharged its obligation by paying in Australian currency. In that case Lord Warrington said (5) that "The general rule I think is well settled—namely, "that in such cases monetary obligations are effectually "discharged by payment of that which is legal tender in the "locus solutionis and, unless there is something in this case "to take it out of the general rule, the question ought, in "my opinion, to be decided in favour of the contention of the "appellant Company." In the same case Lord Wright said (6) that "prima facie, whatever is the proper law of a contract "regarded as a whole, the law of the place of performance "should be applied in respect of any particular obligation "which is performable in a particular country other than the "country of the proper law of the contract." In *Auckland Corporation* v. *Alliance Assurance Company, Ld.* (7) the mode of performance of the contract was said to be governed by the law of the place of performance and that the debt there in question must be discharged by payment in the currency of the place of payment. In *Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (8) Lord Esher M.R. said (9) that "The general rule as to the law which governs a contract is "that the law of the country, either where the contract is "made, or where it is to be so performed that it must be "considered to be a contract of that country, is the law which "governs such contract; not merely with regard to its con-"struction, but also with regard to all the conditions applicable "to it as a contract." See also Dicey's Conflict of Laws, 5th ed., rr. 155, 161, 162; Foote's Private International Law, 5th ed., pp. 482 et seq.; Cheshire's Private International

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(1) [1920] 1 K. B. 614.
(2) [1920] 2 K. B. 287.
(3) [1924] A. C. 514.
(4) [1934] A. C. 122.
(5) Ibid. 138.
(6) [1934] A. C. 151.
(7) [1937] A. C. 587.
(8) (1890) 25 Q. B. D. 399.
(9) Ibid. 405.

H. L. (E.)

1938

NEW BRUNSWICK RY. CO. *v.* BRITISH AND FRENCH TRUST CORPORATION.

Law, 3rd ed., pp. 281 et seq. See also *Perry* v. *Equitable Life Assurance Society of United States.* (1)

Harold Christie K.C., *Cyril Radcliffe* K.C. and *Colin H. Pearson* for the respondents. First, on the question of construction the matter has been concluded by the views expressed in this House in *Feist's* case (2) and *Rex* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* (3). By the terms of the bond, which is described as a gold bond, the covenant is to pay on production of the coupon and the promise is to pay 5 per cent. on what the parties treat as an immovable basis—namely, a gold value—and the interest must follow on the same footing.

Secondly, if we are right on the question of construction, we do not require to rely on estoppel, but we do rely upon it as an alternative answer. There are two branches of the law of estoppel. If a point of law has been conclusively determined, the parties are estopped from subsequently questioning the principle so determined. We rely on that in this case. Again, if a plaintiff has sued on a certain cause of action and recovered damages but thinks he should recover more, he cannot do so, for the defendant can plead the former recovery. This, however, does not arise in the present case. Here the question is not whether it is the same cause of action, but whether it is essentially the same point which is sought to be litigated. A default or consent judgment is not regarded with suspicion, and we submit that it operates as an estoppel. The point is not whether the same cause of action arises, but whether the same question, whether of fact or law, arises. The matter has been conclusively determined in our favour in the first action and therefore cannot be again litigated. In *Howlett* v. *Tarte* (4) Williams J. said (5): "I think it is quite clear upon the authorities to "which our attention has been called, and upon principle, "that, if the defendant attempted to put upon the record "a plea which was inconsistent with any traversable allegation

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(1) (1929) 45 Times L. R. 468.
(2) [1934] A. C. 161.
(3) [1937] A. C. 500.
(4) 10 C. B. (N. S.) 813.
(5) Ibid. 826.

"in the former declaration, there would be an estoppel." Again, in *Cox* v. *Dublin City Distillery Co.* (1) the Lord Chancellor (Sir Ignatius O'Brien) said (2): "It appears to "me a startling proposition that a plaintiff who has delivered "a statement of claim setting forth his cause of action is in "a worse position when the defendant fails to file a defence "than he would be in if a mere bogus defence were put on "the file of the Court which the defendant could not subsequently substantiate. The defendant who does not file "a defence admits the averments in the statement of claim."

Thirdly, as to the law applicable: on this, two facts have to be regarded, (*a*) the bond itself, and (*b*) the surrounding circumstances. As to (*a*) the bearer of the bond, whoever he is, must at maturity present it in England; the money is payable exclusively in English money, and the fact that the bond passes by delivery shows that the parties must have intended that it should be negotiable by English law. As to (*b*) the issue of the bonds was largely made in London, and it was intended that the issue should be made attractive to investors in London by escaping any depreciation in Canadian currency. Before the bonds could become effective they had to be certified by a New York body; they then had to reach London before they actually became bonds. In view of these circumstances English law was clearly intended to be applicable: see *Robinson* v. *Bland* (3), *Rouquette* v. *Overmann* (4), *Chatenay* v. *Brazilian Submarine Telegraph Co., Ld.* (5), *Hamlyn & Co.* v. *Talisker Distillery* (6) and *Moulis* v. *Owen.* (7) In *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society, Ld.* (8) the circumstances upon which the Judicial Committee based its decision are here absent. There the whole subject-matter was governed by New Zealand law. We ask the House to construe the bonds as saying that they should be paid in London in accordance with English law.

F. R. Evershed K.C. in reply. On the question of estoppel

(1) [1917] 1 I. R. 203.
(2) Ibid. 222.
(3) (1793) 1 Wm. Bl. 234.
(4) (1875) L. R. 10 Q. B. 525.
(5) [1891] 1 Q. B. 79.
(6) [1894] A. C. 202.
(7) [1907] 1 K. B. 746.
(8) [1938] A. C. 224.

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.

there is an obvious difference between a case which has been fully argued and one in which there has been judgment by default. In the latter case there can be no estoppel. On the question of the proper law, we contend that Canadian law was intended to be applicable. The place of payment is of little, if any, significance.

The House took time for consideration.

1938. Dec. 13. LORD MAUGHAM L.C. My Lords, the primary question for decision in this appeal is, whether as a matter of construction, the respondents, as holders of 992 5 per cent. First Mortgage Gold Bonds issued by the appellants, are entitled to payment in London of such a sum in sterling as represents the gold value of the nominal amount of principal therein mentioned. There is a further question in relation to the interest payable in respect of such bonds.

Several other important questions arise on the appeal, and in particular :—First, a question whether the appellants are estopped by a judgment in a previous action between the same parties from disputing the right of the respondents to payment on the basis above stated as regards both the principal and the interest secured by the bonds.

Secondly, and on the assumption that the appellants are wrong on the questions of construction raised by the primary question, whether they have been exonerated by an Act of the Dominion legislature, which received the Royal Assent on April 10, 1937, from their obligation to pay a larger amount of currency than the nominal amount specified by the said bonds, that is, the sum of 100*l*. sterling in respect of each bond and interest at the rate of 5 per cent. on that sum, and that although the writ was issued and the judgment of the trial judge was delivered many months before the Act of the Dominion Parliament was passed.

The facts must now be stated. The bonds are part of a series of 6000 Gold Bonds of 100*l*. each, all in the same form and of like amount and date, which were issued by the appellants over fifty years ago—namely, in the month of August, 1884. The appellants are a Corporation organized and existing under the laws of the Province of New Brunswick, and the bonds were issued under powers conferred by the New Brunswick and the Dominion legislatures. A number of the said bonds were issued to the holders of certain gold bonds of a company called the New Brunswick Land and Lumber Company, Ld., in exchange for those bonds, and the remaining bonds of the appellants' said issue were sold in London. Each of the bonds is dated August 1, 1884, and entitled First Mortgage Gold Bond, with the figures 100*l.* sterling on its face. The operative words are :—

"The New Brunswick Railway Company for value received "hereby promises to pay to the bearer or registered holder "hereof on the first day of August 1934 the sum of One "Hundred Pounds Sterling Gold Coin of Great Britain of "the present standard of weight and fineness at its Agency "in the City of London England with interest thereon at the "rate of Five Pounds Sterling per centum per annum payable "semi-annually on the first days of February and August in "each year in the said City of London or, at the option of the "holder, at the office of the company in New Brunswick on "presentation and surrender of the interest warrants or "coupons hereto annexed as they severally become due.

"This bond is one of a series of Six thousand bonds, of like "amount, tenor and date, numbered from 1 to 6000 inclusive "and amounting in the aggregate to Six hundred thousand "pounds sterling all equally secured by a first mortgage or "deed of trust of even date herewith executed by the said "company to the Central Trust Company of New York as "trustee covering the entire railway of the said company "and all its lands and territory, rolling stock, equipment, "rights, franchises, easements, privileges and appurtenances. "The holder of this bond will also be entitled equally with "the holders of each of the other bonds of said issue to the "benefit to be derived from a sinking fund to be appropriated, "derived and set apart from the sale of the lands of the said "railway company for the redemption of said issue of bonds "at the times and in the manner in said mortgage or deed of "trust specified.

"This bond shall pass by delivery, unless registered in the "name of the owner on the books of the company in New "Brunswick, or wherever else the company may keep transfer "books. After a registration of ownership, certified hereon "by the transfer agent or officer of the company, no transfer, "except on the books of the company, shall be valid, unless "the last preceding transfer shall have been to bearer, which "shall restore transferability by delivery ; but this bond shall "continue subject to successive registrations and transfers to "bearer, as aforesaid, at the option of each holder."

Each of the bonds had interest coupons annexed thereto in this form :—" New Brunswick Railway Company will pay the "bearer two pounds ten shillings stg., at its agency in the "City of London, England, or at its office in New Brunswick, "on the first day of............................being six months' "interest on its first mortgage bond No......................."

The coupon numbered 100 for six months' interest payable on August 1, 1934, was at the date of the writ annexed to each of the respondents' said bonds. The other coupons had been detached.

None of the bonds held by the respondents has been registered and no evidence was given that the appellants ever kept transfer books relating to the said issue or registered any of the bonds.

The first mortgage or deed of trust referred to in the said bonds was executed by the appellants in favour of a well known Trust Company of New York as trustee. The deed of trust was dated August 1, 1884, and contained a mortgage of the railway belonging to the appellants, together with the usual provisions for the enforcement of the security in certain events.

It is evident that the principal money secured by each of the bonds was to be paid in London, and that the amount so payable on August 1, 1934, was of such a sum as would represent the price in London in sterling calculated as on that day of 12,327·447 grains of gold of the standard of fineness specified in the First Schedule to the Coinage Act, 1870. On the other hand, the interest expressed to be " at "the rate of 5*l.* sterling per centum per annum " was payable on February 1 and August 1 in each year, either in London or, at the option of the holder, at the office of the appellants in New Brunswick, on presentation and surrender of the coupons which were annexed to the bond. The security vested in the trustee consisted largely of immovable property in New Brunswick, and it is plain that the law of New Brunswick would apply to any proceedings for the purpose of realizing the security.

It is now necessary to state the unusual circumstance which gives rise to the question of estoppel. On August 20, 1934, the respondents commenced an action in the King's Bench Division of the High Court of Justice for the purpose of enforcing payment of the principal moneys and interest secured by a bond which they had acquired bearing the number of 3300. They had already acquired the 992 bonds above mentioned, and it is not clear why no reference was made to those bonds either in the writ or in the statement of claim. Leave was obtained to serve the writ upon the appellants out of the jurisdiction, but they did not enter an appearance in the action. On October 13, 1934, the respondents filed a statement of claim, by which they claimed (as they did in the writ) a declaration that, upon the true construction of the said bond, namely, the bond number 3300, they were entitled to receive from the defendants (*a*) by way of principal such a sum as represented the price in London in sterling, calculated as on August 1, 1934, of 12,327·447 grains of gold of the standard of fineness specified in the First Schedule to the Coinage Act, 1870; and (*b*) by way of the half-yearly interest due thereunder on the said date a sum equal to 2½ per cent. of the amount specified in (*a*), less income tax. They claimed also payment of the sums due on the footing of the said declaration with interest. The respondents filed a notice of motion for judgment in the same terms as the relief claimed in the statement of claim, and they obtained the judgment of the Court on November 7, 1934. That judgment (which I shall call "the default judgment") contained a declaration as to the true construction of the bond referred to in the statement of claim in the terms set out therein, and it was further adjudged that the respondents recovered against the appellants the sum of 183*l.* 3*s.* 5*d.* and costs to be taxed. The judgment states that the Court heard the counsel for the plaintiffs and that no one appeared for the defendants. It is this default judgment which is set up by the respondents as an estoppel which prevents the appellants from questioning the construction of the 992 bonds, either as regards principal or as regards interest.

In March, 1935, the respondents presented to the appellants' agents in the City of London the 992 bonds and the interest coupons remaining annexed thereto, being coupons in respect of the half-yearly interest due on August 1, 1934, and they claimed payment of a sum calculated in accordance with the declaration made in the first action. Such payment was refused and the writ in this action was issued on March 20, 1935.

This action was tried by Hilbery J. on December 18 and 19, 1935. On January 16, 1936, the learned judge delivered his reserved judgment. He held that, upon the true construction of the bonds, the contract contained therein was one for repayment in money of a loan, and that the appellants were entitled to discharge their obligation by payment of 100*l.* sterling for each bond and interest at the rate of 5 per cent. calculated in sterling. In the view of the learned judge the decision of this House in *Feist* v. *Société Intercommunale Belge d'Electricité* (1) was distinguishable. The learned judge also held that the appellants were not estopped by the judgment in the first action upon the ground that each of the said bonds was a separate contract and gave a distinct cause of action to each bearer. The respondents had not claimed specifically by way of alternative claim, either in the writ or the statement of claim, payment of the amounts which would be due to them on the footing of the construction adopted by the learned judge, and accordingly it was adjudged that the respondents should recover nothing against the appellants, though the latter were ordered to pay the costs of the action.

(1) [1934] A. C. 161.

The respondents gave notice of appeal on February 26, 1936. The hearing was postponed pending the decision of the case of *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (1) by this House, in order that the Court of Appeal should have the assistance of the judgment in that case, which raised a somewhat similar point. In the meantime—namely, on April 10, 1937—there was passed by the Parliament of the Dominion of Canada the Act entitled the Gold Clauses Act, 1937, which it is necessary to set out in full:

"1. This Act may be cited as The Gold Clauses Act, 1937.

"2. The expression 'gold clause obligation' in this Act "means any obligation heretofore or hereafter incurred "(including any such obligation which has, at the date of the "commencement of this Act, matured) which purports to give "to the creditor a right to require payment in gold or in gold "coin or in an amount of money measured thereby, and "includes any such obligation of the Government of Canada "or of any province.

"3. In the case of any gold clause obligation payable in "money of Canada, tender of currency of Canada, dollar for "dollar of the nominal or face amount of the obligation, shall "be a legal tender and the debtor shall, on making payment "in accordance with such a tender, be entitled to a discharge "of the obligation.

"4. In the case of any gold clause obligation governed by "the law of Canada payable in Canada or elsewhere, in money "other than money of Canada, tender of the nominal or "face amount of the obligation in currency which is legal "tender for the payment of debts in the country in the money "of which the obligation is payable shall be a legal tender "and the debtor shall, on making payment in accordance "with such a tender, be entitled to a discharge of the "obligation.

"5. Any payment in respect of a gold clause obligation "made before the commencement of this Act, which, if made "hereafter, would entitle the debtor to a discharge, shall be "deemed to have discharged the obligation.

(1) [1937] A. C. 500.

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.
Lord Maugham L.C.

"6. Every gold clause obligation is hereby declared to be "contrary to public policy and no such provision shall hereafter be contained in, or made in respect of, any obligation.

"7. The provisions of this Act shall have full force and "effect notwithstanding anything contained in any other "statute or law."

On May 24, 1937, the Court of Appeal, upon the application of the (present) appellants, gave them leave to amend their defence so as to raise the question whether they were not, by reason of the Canadian legislation, entitled to discharge their obligations by paying the nominal amount thereon; and leave was also given to adduce further evidence on the hearing of the appeal.

The appeal was heard in the month of July, 1937, and the judgments of the Court of Appeal were delivered on November 22, 1937. The Court unanimously allowed the appeal. They held that, upon the true construction of the bonds, the *Feist* construction (1) was applicable both as regards the principal moneys and as regards the coupons due on August 1, 1934, and they made the appropriate declarations. They also ordered that, upon the surrender of the bonds mentioned in the statement of claim with the interest coupons, judgment was to be entered for the respondents for the sum of 182,044*l.* 8*s.* (being 162*l.* 10*s.* 9*d.* in respect of principal and 3*l.* 0*s.* 11*d.* in respect of interest due on August 1, 1934, and a further sum in respect of interest from August 1, 1934, to the date of the judgment in respect of each of the said bonds). It should be added that, in addition to the decision that the *Feist* construction (1) was applicable, the Court held that the appellants were in any event estopped by the default judgment given in respect of bond number 3300 from contending that the bonds and interest coupons, the subject-matter of the present action, ought to be construed in any way other than that in accordance with the declaration above mentioned. All three Lords Justices also held that "the "proper law of the contract" contained in the bonds and interest coupons was Canadian, but that the clause providing

(1) [1934] A. C. 161.

for payment in London must be interpreted and have effect by reference to the law of England, and that the obligations of the appellants in regard to such payment were not affected by the Canadian Act. They also held that the plea of estoppel could not avail the respondents as regards any defence which might be based upon the Canadian legislation, since that legislation was subsequent to the date of the default judgment. Scott L.J. mentioned, however, a final point which, in his opinion, compelled the Court to disregard the two Canadian statutes. They were passed, he said, long after the action had been brought in the King's Bench Division and judgment given in the trial Court and, in his opinion, the Court of Appeal ought to give the judgment which Hilbery J. ought properly to have given—namely, a judgment for the plaintiffs instead of for the defendants. If that had been done, the bondholder's right instead of being one based on contract would have passed into a judgment of an English Court, creating a new right and one to which a subsequent Canadian statute could have no application.

My Lords, on the primary question of the true construction of the bonds none of your Lordships entertains, I think, any doubt. It is clear that the gold clause contained in the bonds was intended as a clause to protect those who acquired the bonds against a depreciation of the currency in the Province of New Brunswick, and, since the judgment of this House in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (1), it is not possible to confine the decision in the *Feist* case (2) to contracts not only containing a gold clause but also possessing indications in the same sense as those which were contained in the *Feist* case. (2) This view has been accepted by judicial tribunals in a number of countries, and I have myself no doubt that the present case is one to which the *Feist* construction (2) should be applied so far as regards the principal sums secured by the bonds.

On the other hand, I do not think that a construction on the lines of the *Feist* decision (2) ought to be adopted, unless the so-called gold clause obligation is expressed in clear

(1) [1937] A. C. 500.

(2) [1934] A. C. 161.

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.
Lord Maugham L.C.

language, and for myself I do not think that this can be asserted in reference to the interest payments. The phrase used is "with interest thereon at the rate of 5*l*. sterling per "centum per annum," and one naturally asks oneself what is the meaning of the word "thereon"? Grammatically it seems to refer to the 100*l*. sterling, simpliciter, since except on that footing it is impossible to ascertain at any particular date between the year 1884 and the year 1934 how much would become payable in English currency in respect of the 100*l*. sterling. That amount became ascertainable on August 1, 1934. At any previous date it might be a considerably smaller sum, or, in possible events, a larger one. Moreover, the coupon which is a coupon payable to bearer either in London or in New Brunswick, states that the New Brunswick Railway Company will pay to bearer 2*l*. 10*s*. sterling without any addition of a gold clause. It may well have been thought convenient to have a definite sum fixed in sterling for the payment half-yearly of the interest due in respect of the coupons. There is no doubt a possible method of avoiding this conclusion, namely, by reading the word "sterling" in the promise to pay interest as meaning "sterling as aforesaid," as suggested by Scott L.J. in the Court of Appeal. I am unable to come to the conclusion that in the circumstances this is a legitimate addition as a matter of construction to the terms of the bonds, and accordingly I have come to the conclusion that the *Feist* construction (1) is not applicable to the interest. It follows that the amount due, apart from other considerations which will next be dealt with, is somewhat smaller than the amount held to be due by the appellants to the respondents in the judgment of the Court of Appeal of November 23, 1937.

On the question of estoppel by the default judgment of November 7, 1934, as regards the bond No. 3300 it will be observed that accepting the *Feist* construction (1) as regards the principal, the estoppel, if allowed, can have effect only as regards the final sum payable for interest. The doctrine of estoppel is one founded on considerations of justice and good

(1) [1934] A. C. 161.

sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them; but in my view the doctrine cannot be made to extend to presumptions or probabilities as to issues in a second action which may be, and yet cannot be asserted beyond all possible doubt to be, identical with those raised in the previous action. In the earlier action here the only relevant issue was as to the true construction of the only bond then sued upon; and an allegation that other bonds of the same issue were in precisely the same form would have been irrelevant and improper. In fact, however, the statement of claim contained no such allegation. Nor is it true to assert that all the bonds of such an issue are necessarily in the same terms. The issue of construction in the second action could indeed be proved in the second action to be *similar* to that decided in the first; but it related to a different cause of action based on other bonds and could not be asserted to be the same issue. Moreover, it is a matter of common knowledge that such bonds are often issued at different dates and in different countries, matters which might well have a possible bearing on their true construction. The defendants in the first action, in special circumstances, might themselves have been estopped from contending as against the plaintiffs for the more limited construction of bond No. 3300 then sued upon, while there might have been no such estoppel as regards the 992 bonds. Finally, it is worth observing that in the case of bonds to bearer little would be gained as regards preventing useless litigation, by upholding the estoppel claimed here by the respondents, since such an estoppel would not avail against some bearer of the bonds other than the appellants, who would therefore only have to sell them in the market to a third party in order to defeat the estoppel.

My Lords, I desire to make it plain that I am not desirous of questioning the general rule on the subject of res judicata laid down by Wigram V.-C. in *Henderson* v. *Henderson*. (1)

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(1) (1843) 3 Hare, 100, 114.

H. L. (E.)

1938

NEW BRUNSWICK RY. CO. *v.* BRITISH AND FRENCH TRUST CORPORATION.

Lord Maugham L.C.

His statement of the rule was cited and approved by the Judicial Committee in *Hoystead* v. *Commissioners of Taxation.*(1) It is, however, to be noted that the learned Vice-Chancellor was stating the rule in general terms, and he qualified the rule by the exception of special circumstances or special cases. I do not think it necessary to express an opinion as to whether the alleged estoppel would have succeeded if the appellants had appeared in and contested the first action. But the judgment in that action limited in form to a single bond was pronounced in default of appearance by the defendants. In my view not all estoppels are " odious " ; but the adjective might well be applicable if a defendant, particularly if he is sued for a small sum in a country distant from his own, is held to be estopped not merely in respect of the actual judgment obtained against him, but from defending himself against a claim for a much larger sum on the ground that one of the issues in the first action (issues which he never saw, though they were doubtless filed) had decided as a matter of inference his only defence in the second action. My Lords, I think there is much to be urged in favour of the observation made by Willes J. in the case of *Howlett* v. *Tarte* (2), though it may have been a little too widely expressed. He said (3) : "It is quite right that a defendant should be estopped from "setting up in the same action a defence which he might "have pleaded but has chosen to let the proper time go by. "But nobody ever heard of a defendant being precluded "from setting up a defence in a second action because he "did not avail himself of the opportunity of setting it up in "the first action." In my opinion we are at least justified in holding that an estoppel based on a default jmdgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the res judicata in the accurate sense. If that be the principle, the appellants are not in the present case estopped from raising any contention they think fit in an action on the 992 bonds.

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(1) [1926] A. C. 155, 170.
(2) 10 C. B. (N. S.) 813.
(3) 10 C. B. (N. S.) 813, 827.

I think it right to observe that it is in my view undesirable that judges should make declarations as to the true construction of documents on motions for judgment in default of defence. It has not, I believe, been the practice to do so in the Chancery Division for a good many years. As far as possible the Court should make such declarations only when the matter has been argued by counsel on each side, and is then the subject of adjudication by the judge.

If we now approach the consideration of the Dominion Act respecting Gold Clause Obligations (1 Geo. 6, c. 33), it is, I think, evident that three questions may arise upon it. First, upon its fair construction does it purport to alter or affect the rights of litigants in a foreign country, meaning thereby any country other than Canada ? Secondly, assuming that the answer is in the affirmative as regards " obligations "governed by the law of Canada," can s. 4 of the Act have any effect in regard to an action to enforce the obligation commenced in a foreign country before the Act came into force ? Thirdly, is the bond in the present case within the terms a " gold clause obligation governed by the law of "Canada " ?

My Lords, the Canadian Act is in some respects curiously worded. Apart from s. 6 it contains nothing purporting directly to alter the obligation of either party under the contracts containing gold clause obligations which are being dealt with. Sects. 3 and 4 are dealing mainly with the questions of legal tender, and each provides that legal tender followed by payment in accordance with the section shall be a good discharge. Sect. 3 deals with obligations to pay in money of Canada ; while s. 4 deals with obligations to pay in money other than money of Canada. Neither section entitles the debtor in terms to a discharge unless he makes a legal tender as well as a payment in accordance with it, and while it is no doubt true that the legal tender and the payment might be practically simultaneous, the language used points strongly to the conclusion that for some reason or other the legislature

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.
Lord Maugham L.C.

has abstained from enacting that the contracts in question are to have effect as if the gold clause obligations were omitted. This can be illustrated further by an examination of s. 4. It relates to cases where the sums due are payable "in "Canada or elsewhere," but in some foreign currency. Let us first take a bond for payment in Canada of, say, German marks. The section is providing that if the nominal amount of the bond is (say) one hundred marks, a tender of one hundred marks in Canada shall be a legal tender and, if followed by payment of one hundred marks, will be a good discharge. This is easy to understand though unusual, for generally speaking, if the debtor owes one hundred German marks in Canada he would discharge his debt in Canadian currency equal at the current rate of exchange to one hundred German marks. It is to be remembered that German marks may not be procurable in Canada; yet the section only applies in the case I am dealing with if the legal tender in German marks can be made. Tender in Canadian dollars will apparently be of no avail.

Now let us take the other case, where the bond is payable in (say) Berlin in German marks. Does the section apply so as to provide what is to be legal tender in Germany, and what is to be a discharge in a German Court? It is well known that in England a promise to pay money is not discharged by a mere tender of the money; but such a tender, if a legal one, coupled with continued readiness to pay the debt has the effect both of preventing any claim for subsequent interest and of entitling the debtor to the costs of an action to recover the debt of the creditor, provided that he complies with the applicable rules of Court. (Halsbury's Laws of England, 2nd ed., ss. 276 et seq.) I am of opinion that the questions that arise as to the validity or form of a tender, or the advantage of making one in a particular forum, are questions of procedure for the lex fori. There may well be special rules in different countries. For example, in this country the rules of Court require payment into Court with a plea of tender. I cannot think that the legislature of Canada was attempting to alter the course of procedure in any country except Canada. The result is that in my opinion s. 4 must be confined upon its true construction to cases where the action to recover the amount due is brought in Canada, which would be a not uncommon case, and is not intended to have any application when the action is proceeding elsewhere.

By s. 6 it is declared that every gold clause obligation is contrary to public policy. That must clearly mean contrary to the public policy of Canada. It cannot be that the section means that all bonds with a gold clause issued in the past in Canada are ipso facto void, still less that bonds issued abroad with such a clause are necessarily void ab initio. If it were so, ss. 3, 4 and 5 would be meaningless, and moreover such a provision as to the past might well expose the companies and others who have issued such bonds payable at a future date to immediate actions for money had and received. It would seem that s. 6 is confined to the future. In my opinion it does not affect the present case.

My Lords, I am of opinion that the second question I have stated above in relation to the Canadian Act must also be answered in the negative. Sect. 4, as I have pointed out, is framed in legal terms. It requires a legal tender of the nominal or face amount of the obligation in a specified currency. In my opinion it is too late to make such a tender after the claim has been repudiated by the debtor and the repudiation has been accepted by the issue of a writ in a foreign jurisdiction. The matter has then passed into the domain of the Court. A Court of law must, of course, obey its own legislature acting within its jurisdiction (see for a parallel case *Performing Right Society, Ld.* v. *Bray Urban District Council* (1)); but there are various limits to the powers of every legislature as regards things to be done or not to be done abroad. I am of opinion that such a statute as is now in question cannot be held to diminish or destroy the rights of an English creditor, and it may be added without compensation, after he has commenced an action in this country. A fortiori is such a statute incompetent to affect the course of justice here after trial and judgment. A Court of Appeal

(1) [1930] A. C. 377.

ought, generally speaking, to give the judgment which the trial Court should have given, and I can see no reason for an exception to that general rule in the present case.

My Lords, having come to the conclusion for the reasons stated that the Canadian Act of 1937 has no application in the present case, it is not necessary to deal with the remaining question, whether the bond is or contains a gold clause "governed by the law of Canada." It would probably be necessary in dealing with that question to decide whether "the proper law of the contract," if the phraseology of Professor Dicey is adopted, is Canadian or English, or, as I should prefer to state it, whether the essential validity of the contract embodied in a bond, including its mode of performance, ought to be determined by Canadian or English law. The answer would depend on the view taken in this particular case as to the intention or presumed intention of the parties. Opinions on the matter may differ. Since your Lordships are, as I understand, agreed that the appeal must fail (except as to the interest payment) on other grounds, I think it would be unwise for this House to express a final opinion on this point, and for my part I propose to abstain from dealing with it in any way.

My Lords, in view of the above considerations, I think the decision of the Court of Appeal was right except as regards the final coupons for interest. I think the appeal should succeed as to the final coupons but should be dismissed in other respects. The costs should be paid by the appellants.

Lord Thankerton. My Lords, I have had the privilege of considering the opinion just delivered by my noble and learned friend on the Woolsack and the opinions about to be delivered by my noble and learned friends.

In the first place, I agree that, as regards the principal sums, the gold clause in the bonds here in suit should be construed according to what may be conveniently called the *Feist* construction (1), but that the clause as to interest payments is not subject to that construction.

(1) [1934] A. C. 161.

Lord Thankerton.

In the second place, I agree, for the reasons stated by my noble and learned friends, that the plea of estoppel by reason of the default judgment dated November 7, 1934, is ill-founded.

In the third place, as regards the Canadian Gold Clauses Act, 1937, I agree with my noble and learned friends, Lord Russell of Killowen and Lord Wright, that, apart from s. 5, which is not material to the present case, the Act does not operate retrospectively, and, in accordance with the views expressed by them, I would hold that the Act is irrelevant in this case, either (*a*) on the ground that the decision of this House ought to express the judgment that should have been given on January 16, 1936, when Hilbery J. gave judgment, long prior to the passing of the Gold Clauses Act, or (*b*) on the ground that prior to such enactment, liability on the bonds had been repudiated by the appellants and they were being sued in respect of such repudiation, whereby it was no longer open to them to tender payment in satisfaction of the repudiated obligations.

My Lords, in this view, it becomes unnecessary to consider further the construction of the Gold Clauses Act, including the question whether the gold clause obligation in these bonds is " governed by the law of Canada," or to consider what is the proper law of the contract embodied in these bonds. On these matters I express no opinion.

I agree with the motion proposed by my noble and learned friend on the Woolsack.

LORD RUSSELL OF KILLOWEN. My Lords, as to the construction of these bonds, so far as regards the principal moneys payable thereunder, I feel no doubt but that the *Feist* construction (1) must be applied. One may well repeat what was said in the *Bondholders'* case (2), namely, that while the features here pointing to the *Feist* construction (1) are fewer and less powerful than in the Feist bonds, uniformity ought to prevail in regarding gold clauses as clauses framed for the purpose of protecting lenders against depreciation of

(1) [1934] A. C. 161.

(2) [1937] A. C. 500, 556.

H. L. (E.)
1938
NEW BRUNSWICK RY. CO.
v.
BRITISH AND FRENCH TRUST CORPORATION.

Lord Russell of Killowen.

currency, and construing them accordingly. As Scott L.J. has pointed out in his judgment in the present case, the question depends primarily on the wording of the alleged gold clause itself.

As regards the interest payable under these bonds the matter stands otherwise. Each coupon provides for payment of a definite sum—namely, 2*l.* 10*s.* sterling. There is no reference to gold in the coupon. The provision as to interest in the bond is for payment of interest " thereon " at the rate of five pounds sterling per annum. Again there is no reference to gold. Nor is it permissible to do what Scott L.J. has done, namely, to read " sterling " as meaning " sterling "as aforesaid " and so incorporating a reference to gold, and for this reason, namely, that it would be impossible to ascertain on any February 1 or August 1 (except August 1, 1934) what would be the amount of the principal moneys upon which interest was payable. To calculate the amount of interest payable during the currency of the bond would be impossible. It must therefore necessarily follow that the provision in the bond for interest, and the coupons, must be regarded as provisions for the payment of fixed amounts in currency—namely, 2*l.* 10*s.* every half year. A marked distinction has been drawn between principal and interest in this respect, just as another equally marked distinction has been drawn between them in that the principal is only payable in London, whereas interest is payable either in London or in New Brunswick.

As a result of these views on construction it follows that the question of estoppel by the judgment in the 1934 action can only arise in regard to interest. That judgment was entered for the plaintiffs in default of appearance by the defendants. The parties were the same as the parties to the present action. The action was brought to enforce payment of Gold Bond No. 3300 upon the footing that the *Feist* construction (1) applied both as to principal and interest. By the default judgment it was declared that upon the true construction of that bond the plaintiffs, as holders thereof, were entitled to recover sums for principal and interest upon that footing, which so calculated amounted altogether to a sum of 183*l.* 3*s.* 5*d.* This sum it was adjudged that the plaintiffs should recover against the defendants with costs to be taxed.

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(1) [1934] A. C. 161.

My Lords, numerous authorities upon this question of estoppel were cited to us, but after considering them with care I can find none which would justify us in adopting the view, much less compel us so to do, that the doctrine applies so as to estop a defendant (against whom a default judgment has been obtained based upon a particular construction of one contract) from raising as a defence in contesting a subsequent action on a different contract (but couched in the same or similar language), that the construction of that contract is something different from the adjudged construction of the other contract. It is true that in the judgment of the Judicial Committee in the case of *Hoystead* v. *Commissioner of Taxation* (1) the following passage occurs: "It is seen from "this citation of authority that if in any Court of competent "jurisdiction a decision is reached, a party is estopped from "questioning it in a new legal proceeding. But the principle "also extends to any point whether of assumption or "admission, which was in substance the ratio of and "fundamental to the decision." These no doubt are wide words, but they relate to a case of estoppel by a judgment in contested proceedings; and I am not prepared to extend them to the case of a default judgment on a claim under contract A, followed by an action under a similarly worded contract B. I would only add that I agree with what the Lord Chancellor has said as to the undesirability of making declarations as to the construction of documents except after arguments on behalf of all persons interested.

As regards the Gold Clauses Act, 1937, I have come to the conclusion that in the circumstances of this case, it has no application to the bonds here in question. It was assented to on April 10, 1937. Long before its enactment, liability on the bonds according to their true construction had been repudiated by the appellants. The respondents issued their writ on March 20, 1935, and ought to have obtained judgment on January 16, 1936, and to have thereby acquired a new right in which the contractual right would have merged. The Act is not very happily worded, but what it purports to do is to provide as from April 10, 1937, a special way of fulfilling certain then existing obligations by tender and payment as therein mentioned. But by that time the appellants were incapable of tendering payment in satisfaction of their contractual obligations under these bonds; they had repudiated those obligations and were being sued. They could only tender damages. I do not forget that the definition of "gold clause obligation" in s. 2 includes an obligation which has matured; but in my opinion a matured obligation, while it includes a bond due but not presented for payment or a mortgage debt due but not called in, does not include a repudiated obligation for the fulfilment of which tender of payment has become impossible. The Gold Clauses Act, 1937, is accordingly no obstacle to the respondents.

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(1) [1926] A. C. 155, 170.

This view renders it unnecessary to consider whether these gold clause obligations are "governed by the law of Canada," within the meaning of the Act, a question which would involve a decision as to what in this case is "the proper law of the "contract." As to that I express no opinion.

In the result I would allow this appeal, but only in regard to the matter of interest. The order of the Court of Appeal should be varied by substituting therein for the words and figures "a sum equal to 2½ per cent. of the amount specified "in (A) above" the words "the sum of 2*l.* 10*s.*" and by substituting for the sum "182,044*l.* 8*s.*" the sum of "181,502*l.* 18*s.* 8*d.*" and for the sum of "3*l.* 0*s.* 11*d.*" the sum of "2*l.* 10*s.*" I agree that notwithstanding this variation of the order appealed from, the appellants should pay the costs of the appeal to your Lordships' House.

Lord Wright. My Lords, this appeal, which relates to the claim in respect of 992 bonds issued by the appellants on August 1, 1884, and described as First Mortgage Gold Bonds

H. L. (E.)
1938
NEW BRUNSWICK RY. CO.
v.
BRITISH AND FRENCH TRUST CORPORATION.
Lord Wright.

payable August 1, 1934, gives rise to various questions which call for separate discussion.

The first relates to the true effect of the stipulation as to the amount of the bond, which is in identical terms in each one of those in question.

I agree with the Court of Appeal who reversed the trial judge that this clause is governed as regards the principal obligation by the same construction as that applied by this House to the obligation in *Feist* v. *Société Intercommunale Belge d'Electricité* (1), which was in effect that the bonds were not contracts for payment in gold coin as a commodity or in bullion, but were contracts for the payment of money, the amount of which was to be measured by the value in sterling at the due date of 100 gold coins of Great Britain of the standard weight and fineness existing at the date of the bond. The sum of 100*l.* sterling in a case like this is sometimes described as the nominal or face amount of the bond. This description, though convenient, is not accurate, because 100*l.* only defines the sum due so long as English sterling should remain equal in value to the stipulated gold coin. If sterling should depreciate, as it has done, relatively to the specified gold coin, 100*l.* merely provides a measuring point or yard stick from which to determine how many units of currency will have to be paid to correspond to the gold value at the due date. Thus in the present case the bond according to its tenor could be discharged only by payment of something like 160*l.* In effect the gold clause is aimed at protecting a creditor against the risk of depreciation of the currency and is particularly important in the case of long-term obligations. That is in substance the effect of the *Feist* construction (1) which has since been applied in *Rex* v. *International Trustee for Protection of Bondholders Aktiengesellschaft* (2), though in this case the features which point to that construction are perhaps less numerous and less strong than in the *Feist* case. (1) The clause seems to me to be one which has been adopted in business and financial affairs, with a clear understanding of what was meant, though the language is not precisely accurate. The clause seems to have been in common use since about 1870, in substantially the same form though with minor variations. I think the *Feist* construction (1) should prevail here. I note in passing that the interest payments are not, as will be explained later, subject to the gold clause provision and hence it is not open here to invoke an argument relied on in the *Feist* case (1), that while the interest was expressed to be payable in gold coin, that was impossible in fact as there were not gold coins corresponding to the fractions of a pound. The same argument was also available in the *Bondholders'* case. (2) But I do not regard that feature as essential to the *Feist* construction (1) which depends on broader considerations.

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(1) [1934] A. C. 161. (2) [1937] A. C. 500.

The next question is whether an Act of the Parliament of Canada, the Gold Clauses Act, 1937, applied to these bonds, and, if so, with what effect. There was a similar Act of the New Brunswick Parliament which has not been separately discussed. In the Court of Appeal important and difficult questions were examined as to whether the bonds were governed by Canadian law and as to whether the Act applied to payment in this country in discharge of the bonds. I desire to reserve my opinion on these questions, which are not material in this appeal, so that anything I might say here would be merely matter of observation. I reserve my opinion because whatever view is taken of the general effect of the Canadian Act, the matter of the Act can and should be disposed of in this case on a point briefly stated by Scott L.J. at the end of his judgment as a matter which would in any event have compelled him to disregard the change in the Canadian Law. To deal with the question certain dates must first be stated. The writ in the action was issued by the respondents as plaintiffs on March 20, 1935. On January 16, 1936, Hilbery J. gave judgment for the appellants, dismissing the action. The claim was for a declaration claiming in effect that the *Feist* construction (1) applied to the gold clause. The judge rejected that construction. He made no order on the claim for payment in accordance

(1) [1934] A. C. 161.

(2) [1937] A. C. 500.

with that construction except in the sense that he adjudged that nothing should be recovered by the respondents. The Canadian Act became law on April 10, 1937. On June 2, 1937, the appellants, by leave of the Court of Appeal, delivered an amended defence setting up the Act. The Court of Appeal delivered judgment on November 22, 1937, reversing the judge, applying the *Feist* construction (1) to the bond and treating the Act as not applying. The objection raised by Scott L.J. was that as the Act was passed after the judgment in the King's Bench Division, and as judgment there should have been entered for the respondents, the judgment should be thought of as if Hilbery J. had given judgment for the respondents instead of the appellants.

In substance I think this objection should receive effect and that for purposes of these proceedings the Canadian Act or Acts cannot apply, and that for that reason the decision of the Court of Appeal was right. It would certainly seem hard that the respondents should lose their rights merely because the judge had erroneously construed the bond. The matter, however, must be examined more precisely.

The powers of the Court of Appeal depend on the rules of procedure defined in the Rules of the Supreme Court, of which the relevant rule is Order LVIII., rules 1 and 4. The material words of rule 1 are, "All appeals to the Court of "Appeal shall be by way of rehearing." The material words of rule 4 are, "The Court of Appeal shall have power . . . . "to give any judgment and make any order which ought to "have been made and to make such further or other order "as the case may require." Apart from these last words, it would seem clear that the Court of Appeal is to rehear the case and to give the judgment which the judge appealed from ought to have pronounced. This obviously would shut out any change of law between the trial and the appeal. But the last words, "to make such further or other order "as the case may require" have to be considered. The Court of Appeal has power to admit under strict conditions and limitations further evidence, and if it does so that may

(1) [1934] A. C. 161.

H. L. (E.)
1938
NEW BRUNSWICK RY. CO. *v.* BRITISH AND FRENCH TRUST CORPORATION.
Lord Wright.

necessitate it making a different order from that of the judge. Again, it is clear that in certain cases a change in the law since the trial may have to be regarded by the Court of Appeal. This has been done in various reported cases. In particular this course has been followed where the change in the law has given to the Court a power or discretion to grant remedies or rights to relief which were not within its competence at the date of the trial. Such a case was *Quilter* v. *Mapleson* (1) and *Stovin* v. *Fairbrass*. (2) In the latter case the power to grant an order for possession under the Rent Restriction Acts had been enlarged since the original hearing, and the Court of Appeal gave relief accordingly. Similarly an injunction granted at the hearing may be discharged on appeal if the facts have changed, as in *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board*. (3) But I respectfully venture to think that the language of Lord Gorell in that case (4), "the Court of Appeal was "entitled to make such order as the judge could have made "if the case had been heard by him at the date on which the "appeal was heard," is intended not to be taken apart from the context in which it was used by the noble and learned Lord. In *Performing Right Society, Ld.* v. *Bray Urban District Council* (5) the Privy Council gave effect to an Act of the Irish Free State Legislature which had been passed after the Court of Appeal in Ireland had given judgment. This Act provided that certain copyrights which the Court of Appeal had negatived should be deemed to subsist and always to have subsisted, but that no remedy or relief should be recoverable in respect of any such copyright. The Judicial Committee advised that the appeal should be allowed to the extent of upholding the copyright, but made no order as to remedy or relief. The Act there in question was clearly retrospective and intended to affect pending actions.

It must always be a question in each case whether an Act can be construed as having such effect. In the case of the

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(1) (1882) 9 Q. B. D. 672.
(2) (1919) 88 L. J. (K. B.) 1004.
(3) [1912] A. C. 788.
(4) [1912] A. C. 788, 802.
(5) [1930] A. C. 377.

Canadian Act, I cannot find that any such intention is evinced. The Act speaks as on April 10, 1937. It states in terms (s. 2) that it applies to any such obligation which has at the date of its commencement matured, but I see no reason to extend that to an obligation which has not only matured, but at the material date has been the subject of a judgment and is the subject of a pending appeal. Sect. 6 of the Act is not directly relevant in this connection, but in so far as it goes is consistent with the view that the Act is not intended to reopen transactions. It may be that the section is only inserted ex abundante cautela. In my opinion where a statute interferes with vested rights in this manner it is not prima facie to be construed as having the effect claimed by the appellants here. I think the presumption is all the other way and I do not think the section should be construed as requiring or indeed entitling the appellate Court to give any other judgment than that which the judge ought to have given. I think the statute should be treated in these proceedings as inapplicable.

Mr. Cyril Radcliffe has pressed a further argument based on the terms of s. 4. This is that at the date of the appeal the conditions of the section could not be fulfilled. When the appellants repudiated the contract by refusing to pay on the basis of the *Feist* construction (1) and the respondents accepted that repudiation by issuing the writ, then, he argued, the condition postulated by s. 4, the making of a legal tender of the debt in accordance with the terms of s. 4 was no longer available and hence the section could not come into effect after the Act became law. I agree with this argument but I do not need to base my decision upon it, as the first ground I have stated is sufficient.

For these reasons, I think the appeal should be dismissed so far as regards the principal sum.

There remains a separate point on the interest. The Court of Appeal held that the interest payments were on the same footing as the principal sum, and were payable on the gold basis. Scott L.J. said he construed the word "sterling"

(1) [1934] A. C. 161.

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.
Lord Wright.

as meaning "sterling as aforesaid." I cannot accept this re-writing of the words of the obligation. The contrast between the language used in respect of the principal sum and that used in respect of the interest is definite. If it had been intended to apply the gold obligation to the interest, that should have been done by precise words as was done in *Feist's* case (1) and in the *Bondholders'* case. (2) The Court would have no right to read these words in even if the Court thought that principal and interest should for practical reasons stand on the same footing. But I do not so think. The effect of the gold obligation is that the measure may vary from time to time with changes in the ratio of value between gold and currency and the sum finally due on the maturity of the bond cannot be fixed until the due date. The parties may have thought it simpler to avoid all such complications in respect of the obligations recurring twice a year throughout the currency of the bond to pay interest and to fix the interest once for all at the precise sum in sterling which is expressed.

It is, however, contended that the appellants are estopped from raising this point or relying on this construction because of a judgment obtained against them in default of appearance in an action brought by the respondents on bond No. 3300, which was a bond of the same series, but not one of the 992 bonds which are the subject of this action. In the default judgment dated November 7, 1934, the Court made a declaration in respect of the principal and interest under bond 3300 that both were payable in gold and entered judgment for the respondents for the sum due on that footing.

A judgment by default, if not set aside by the Court on a proper application under the Rules of Court, is binding on the parties (which term may in this as in other cases include privies) and constitutes res judicata in respect of the matter directly decided. Thus it is not possible for the appellants to reopen the question in regard to bond 3300 or to contest the declaration made in respect of that bond as to its construction and effect. The respondents, however, have contended that the default judgment has created an estoppel

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(1) [1934] A. C. 161.

(2) [1937] A. C. 500.

H. L. (E.)
1938
NEW BRUNSWICK RY. CO. *v.* BRITISH AND FRENCH TRUST CORPORATION.
Lord Wright.

against the appellants on the true legal construction of the provision as to interest which is all that is now in issue. It is not contested that there is no res judicata in regard to the 992 bonds sued on in the present proceedings in the same sense that there is res judicata in respect of bond 3300. It is accordingly open to the appellants to defend the action in respect of these 992 bonds, but in doing so, it is said, the appellants are bound by the construction of the interest provision which the Court declared in the default action, because that specific issue of legal construction was decided as against the appellants. They had the opportunity of contesting it and of raising the argument which they have raised before this House, and, as they omitted to do so, are now precluded or estopped from raising it.

In my judgment there are several reasons why this contention should not be accepted. It may be that where a matter of fact or law has been adjudicated upon by the Court on the same instrument and in regard to the same facts and between the same parties, an estoppel arises in regard to that matter, at least in a case where the party estopped has appeared in the proceedings and either contested the issue or has contested the particular decision. This is not res judicata in the sense that the judgment binds the parties, but it is based on analogous principles. The decision of the Court, it was said, should not be disputed by parties to it in a matter which was fundamental to the decision, though it was not the decision itself. That at least was the view taken by the Privy Council in *Hoystead* v. *Commissioner of Taxation* (1) where a matter fundamental to the decision assumed and admitted in a previous litigation was held to bar parties from contesting the issue in a subsequent litigation. The parties were the same in both proceedings, and the subject-matter was the same except in the sense that the question, which was that of liability to taxation, arose in respect of a later year in the second action. In *Broken Hill Proprietary Co., Ld.* v. *Broken Hill Municipal Council* (2), also a case raising questions of taxation, it was held that the previous decision did not estop

(1) [1926] A. C. 155.

(2) [1926] A. C. 94, 100.

the taxpayer. "The decision of the High Court related to "a valuation and a liability to tax in a previous year, and "no doubt as regards that year the decision could not be "disputed. The present case relates to a new question "—namely, the valuation for a different year and the liability "for that year. It is not eadem quaestio, and therefore the "principle of res judicata cannot apply." It is not necessary here to decide between these judgments if they conflict or to reconcile them if they merely seem to conflict. It is enough to say that they do not refer to default judgments or to cases arising in respect of different bonds or instruments, or to different states of fact, even if they appear to be identical in all practical respects.

No authority has been produced in which a party has been held to be estopped from raising in a litigation an issue which he might have raised in a previous litigation in which he allowed judgment to go by default and omitted to raise the issue. The nearest analogy is the case of *Howlett* v. *Tarte*. (1) A defendant, sued for rent or a periodical payment under a building agreement, failed to plead issuably. His plea was struck out and judgment went against him for default of pleading under the procedure then current. He was sued for another instalment and by way of defence pleaded that the building agreement had been superseded by an agreement for a yearly tenancy which had been determined, so that the rent claimed was not due. It was held that he was not estopped. That decision has been explained as depending on the old system of pleading. But I think it depends on wider principles. I think it implies that default is not to be treated as an admission. Willes J. said that the plea in the second action, which was by way of confession and avoidance, was consistent with the record. He said that the objection was a new device, which he thought should not be introduced. "Nobody," he added, "ever heard of a defendant being "precluded from setting up a defence in a second action "because he did not avail himself of the opportunity of setting "it up in the first action." It is enough for present purposes

(1) 10 C. B. (N. S.) 813.

to treat this observation as limited to a case where judgment has gone by default, whether of appearance or pleading. In that sense I should accept these observations of Willes J., one of the greatest Common Law judges. There are grave reasons of convenience why a party should not be held to be bound by every matter of fact or law fundamental to the default judgment. It is, I think, too artificial to treat the party in default as bound by every such matter as if by admission. All necessary effect is given to the default judgment by treating it as conclusive of what it directly decides. I should regard any further effect in the way of estoppel as an illegitimate extension of the doctrine, which in the absence of express authority I am not prepared to accept.

But in the present case it is not necessary to go so far, because there is an even stronger reason against admitting the estoppel. It is true that the default judgment expressly declares that the plaintiffs were entitled to half-yearly interest on the basis of the gold clause. I may observe that in my experience it is unusual, and I think it is undesirable, in a default judgment to make a declaration on the construction of a document, but apart from that it is here a declaration limited to bond 3300. There was no issue before the Court as to any or all of the 992 bonds now sued on. The construction of each and any of these bonds was not a traversable issue in the previous action. The appellants could not be charged with the omission to traverse a claim which could not be traversed in that action because it was not before the Court. Even on the narrowest view of the decision in *Howlett* v. *Tarte* (1), which would limit it to excluding the estoppel only when the particular issue could not have been traversed in the former action, the estoppel could not arise in this case. This ground is enough to distinguish the present case from any other case in which an estoppel has been found.

I cannot help observing that this conclusion is in accordance, as I think, with practical convenience. If a party wishes to make an action a test action he can do so if he secures the consent of the other party. If that consent is obtained, an

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(1) 10 C. B. (N. S.) 813.

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.
Lord Wright.

estoppel may well be established in all proper respects. But if a writ is issued for a small claim, the defendant may well think it is better to let judgment go by default rather than incur the trouble and expense of contesting it. When, as here, the default judgment on one bond is used as governing the construction of 992 other bonds, even if identical in tenor, it would be a great hardship if the defendant were precluded from contesting the later action. I think the plea of estoppel fails.

In my opinion on the question of interest the appellants are right and the order of the Court of Appeal should be varied accordingly.

Lord Romer. My Lords, the questions arising on this appeal relate to certain bonds that were issued by the New Brunswick Railway Company, and contain what is now commonly known as a gold clause, the meaning and effect of which were determined by your Lordships' House in the case of *Feist* v. *Société Internationale Belge d'Electricité*. (1) It was there held that the obligation imposed upon the debtor by such a clause is not an obligation to pay in gold coin or to deliver gold in specie but is an obligation to pay at the due date a sum equal to the then value of the gold coin specified. The decision in that case must now be regarded as laying down a general rule for the construction of all gold clauses in the absence of clear language in the contract excluding that construction, and not as one depending upon the particular circumstances of that case. In the case of *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (2), my noble and learned friend Lord Russell of Killowen expressed himself as follows (3): "These "gold clauses have, however, come under the review of judicial "tribunals in many countries and the '*Feist* construction' (1) "has prevailed, in that they are generally regarded merely as "clauses to protect one of the contracting parties against "a depreciation of the currency. It would, I think, be

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(1) [1934] A. C. 161.
(2) [1937] A. C. 500.
(3) [1937] A. C. 500, 556.

"regrettable if uniformity in this respect did not prevail, "and a different construction should be applied, except in "cases where the '*Feist* construction' (1) is expressly "excluded." In the same case, when it was before the Court of Appeal, my noble and learned friend Lord Wright, then Master of the Rolls, said this (2): "The gold clauses in bonds "and obligations are very common in international contracts "and in every part of the world. It would be a very serious "matter if contracts of that character were treated by "particular Courts as having a different meaning, in the "absence of language and surrounding circumstances of a "decisive character compelling that conclusion. The con- "struction of such commercial clauses ought to be as far as "possible uniform unless there are the strongest considerations "involving a different construction." I am unable to find any sufficiently substantial distinction between the language of the bonds now in question and the language of the bonds that were being considered in the *Feist* case (1) and the *Bondholders'* case. (3) I accordingly agree with the decision of the Court of Appeal so far as relates to the principal moneys secured by the bonds. But I differ respectfully from their decision as to the interest. The only obligation undertaken in respect of interest is expressed in the bonds as follows: "With interest thereon at the rate of five pounds sterling per "centum per annum payable semi-annually on the first days "of February and August in each year in the said City of "London or, at the option of the holder, at the office of the "Company in New Brunswick on presentation and surrender "of the interest warrants or coupons as they severally become "due." I am unable to regard the word "thereon" in this provision as referring to the capital sum secured by the bond; for that sum, though an unvarying sum fixed once and for all on August 1, 1884, could not be ascertained under the *Feist* Construction (1) until August 1, 1934, when it fell due for payment, inasmuch as the amount would depend upon the value of gold at that date. It would, therefore, be

(1) [1934] A. C. 161.
(2) [1937] A. C. 515.
(3) [1937] A. C. 500.

H. L. (E.)
1938
NEW BRUNSWICK RY. CO. v. BRITISH AND FRENCH TRUST CORPORATION.
Lord Romer.

impossible to ascertain the amount due for interest in any half-year other than the one ending on that date. The word "thereon" must accordingly in my judgment be regarded as referring to the sum of one hundred pounds sterling previously mentioned, a view that is corroborated by the coupons themselves, which provide for the payment of *2l.* 10*s.* sterling each half-year, that sum being described as being six months' interest on the mortgage bond. This would appear to have been the construction adopted in the Court of Appeal by Scott L.J. But he thought that the word sterling when used in relation to the interest on the bond should be read as meaning "sterling as aforesaid," that is to say "Sterling gold coin of Great Britain of the present standard "of weight and fineness." I can find no justification for this departure from what seems to me to be the unambiguous language of the bond. The reference to gold coin in the promise to pay the principal sum and the omission of all such reference in the promise to pay interest is significant. There is nothing to show that the omission was not intentional, and it would be wrong for a Court of construction to disregard it. In these circumstances the appellants cannot in this action be called upon to pay in respect of interest more than *2l.* 10*s.* on each bond unless this question of interest be res judicata by reason of the judgment by default in the earlier action brought by the respondents against the appellants.

My Lords, as to this I am unable to agree with the Court of Appeal. Whether a judgment by default can ever be relied upon as res judicata, and, if it can, whether the judgment alone is to be regarded, or whether the whole record of the proceedings may be looked at, are questions upon which I do not find it necessary to express any opinion. For, assuming both those questions to be answered in favour of the respondents to this appeal, I am unable to discover anything in the judgment or in the record of the proceedings in the former action that can estop the appellants from now litigating the question of the amount of interest payable under the 992 bonds sued upon in the present action. In the earlier action the only question of construction mentioned in the writ or

H. L. (E.)
1938
New Brunswick Ry. Co. v. British and French Trust Corporation.
Lord Romer.

in the statement of claim was one as to the construction of the bond then being sued upon, and the judgment pronounced in default of appearance cannot, in my opinion, be regarded as having determined the question of the construction of the other bonds possessed by the respondents. For that question was never a traversable issue in the action, and would not have been a traversable issue even if the action had been fought out upon a defence that merely put in issue the allegations contained in the statement of claim. Had the question of construction been then determined by the Court after argument, the decision would no doubt have been followed in any action brought subsequently upon any other bonds in the same form; and would necessarily have been followed had the decision been that of this House. But this would have happened whoever might have been the plaintiff in the action subsequently brought. It would have resulted however from the respect paid to authority and not from an application of the doctrine of res judicata. In other words it would have resulted from the fact that in the former action a precisely similar question had been decided, and not because the same question had been decided. In this connection some reliance was placed by the respondents upon a passage contained in the judgment of the Privy Council delivered by Lord Shaw in the case of *Hoystead* v. *Commissioner of Taxation.* (1) The passage is as follows: "It is seen from "this citation of authority that if in any Court of competent "jurisdiction a decision is reached, a party is estopped from "questioning it in a new legal proceeding. But the principle "also extends to any point, whether of assumption or admission, "which was in substance the ratio of and fundamental to the "decision." It was sought to treat this passage as an authority for the proposition that the plea of res judicata can successfully be raised whenever it can be shown that a question substantially similar to that being litigated has been decided in an earlier action between the same parties. My Lords, I cannot read the words that I have just cited as laying down any such proposition, a proposition for which, I venture to

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(1) [1926] A. C. 155, 170.

H. L. (E.)

1938

NEW BRUNSWICK RY. CO. *v.* BRITISH AND FRENCH TRUST CORPORATION.

Lord Romer.

think, no authority can be found in the books. It is no doubt true to say that whenever a question has in substance been decided, or has in substance formed the ratio of, or been fundamental to, the decision in an earlier action between the same parties, each party is estopped from litigating the same question thereafter. But this is very different from saying that he may not thereafter litigate, not the same question, but a question that is merely substantially similar to the one that has already been decided. If in an action the question of the construction of a particular document has been in substance decided, each party to the action is estopped from subsequently litigating the same question of construction of that particular document. But he is not estopped from subsequently litigating the question of construction of another document even though the second one be in substantially identical words. For the documents are two distinct documents, and the questions of their construction are two distinct questions.

My Lords, for these reasons I am of opinion that Hilbery J. ought to have given judgment in favour of the respondents for the sum of 162*l.* 10*s.* 9*d.* for principal and 2*l.* 10*s.*, less income tax, for interest due on August 1, 1934, in respect of each of the 992 bonds. In point of fact he ordered judgment to be entered for the appellants. For he declined to give to the bonds the *Feist* construction (1), holding that there were considerable differences between the language of the bonds in that case and the language of the bonds in the case before him. So indeed there are. But at the date that the learned judge was dealing with the matter the *Bondholders'* case (2) had not been decided by the Court of Appeal; and it is that decision, affirmed as it was by your Lordships' House, that has robbed those differences of all materiality. The respondents then took the matter to the Court of Appeal. But by the time the appeal came on for hearing a Canadian Act known as the Gold Clauses Act, 1937 (1 Geo. 6, c. 33), had come into force. This fact is clearly of no materiality if the "proper law of the contract" contained in the bonds

(1) [1934] A. C. 161.

(2) [1937] A. C. 500.

be the law of England. But, even if the proper law of the contract be Canadian, the Act cannot in my opinion avail the appellants. For the bonds provide for the payment of the principal moneys in London, so that although the measure of the company's obligations should have to be determined according to the law of Canada, its obligations in respect to the principal moneys would have to be discharged in conformity with the law of England. For in the case of a contract which is governed by English law, but which provides for its performance in a foreign country, a term is to be implied in the contract that such performance shall be regulated by the law of that country, i.e., the lex loci solutionis, and there being no evidence that Canadian law differs from our law in this respect it is to be assumed that this rule prevails in Canada. If, therefore, Canadian law were the proper law of the contract, it would become necessary to ascertain whether the Canadian Act is one that affects the measure of the company's obligations or merely purports to affect the method in which those obligations are to be discharged.

By s. 2 of the Act the expression "gold clause obligation" is defined as meaning any obligation theretofore or thereafter incurred (including any such obligation which had, at the date of the commencement of the Act, matured) which purports to give to the creditor a right to require payment in gold or in gold coin or in an amount of money measured thereby. In view of the fact that the *Feist* construction (1) regulates the bonds in the present case they must not be regarded as purporting to give the holders a right to require payment in gold or in gold coin. They do, however, purport to give him a right to require payment in an amount of money "measured thereby" and therefore contain a "gold clause "obligation" within the meaning of the Act although they had matured at the date of the commencement of the Act. Sect. 3 is concerned only with gold clause obligations payable in money of Canada and can therefore be passed over. But then comes s. 4, which deals with gold clause obligations governed by the law of Canada, payable in Canada or

(1) [1934] A. C. 161.

elsewhere in money other than money of Canada. So that in the case supposed the clause would seem to be applicable to the bonds in question. Now the section provides that in the cases to which it applies "tender of the nominal or face "amount of the obligation in currency which is legal tender "for the payment of debts in the country in the money of "which the obligation is payable shall be a legal tender, and "the debtor shall, on making payment in accordance with "such a tender, be entitled to a discharge of the obligation." My Lords, there was considerable discussion during the argument before your Lordships as to the precise meaning to be attributed to the words "tender" and "legal tender" in this section. But, whatever may be the precise meaning of those words, the section is, in my opinion, dealing with the discharge of the obligation and in no way with its measure. It does not for instance purport to abrogate or interfere with the application of the rule in *Feist's* case. (1) On the contrary it is in terms dealing with cases where the *Feist* construction (1) applies and cases where it does not. For it deals both with cases where the obligation is to pay (say) 100*l.* by the delivery of gold or gold coin, and cases where the obligation is by reason of the reference to gold or gold coin construed as one to pay not 100*l.* but (say) 160*l.* In the latter case the clause, as I read it, enacts that if a "legal "tender" of 100*l.* is made in 100 treasury notes of 1*l.* each and such notes are subsequently paid by the debtor, the debtor is discharged from "the obligation," i.e., the obligation to pay 160*l.* The measure of the obligation remains what it was before the Act. But it can be discharged by a "legal "tender" and a subsequent payment of 100*l.* This being so and the method of discharge of the appellants' obligations under the bonds being in any case regulated by the law of England and not the law of Canada, s. 4 of the Act can have no bearing upon the present case.

It remains, however, to consider s. 6 of the Act, which is in these terms: "Every gold clause obligation is hereby "declared to be contrary to public policy and no such

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(1) [1934] A. C. 161.

"provision shall hereafter be contained in or made in respect "of any obligation." This section is plainly dealing with the measure of the obligation and not with its discharge, and in any contract governed by Canadian law must have effect given to it. But it could not affect the present case unless the first sentence of it can be read as an enactment independent of and unqualified by the second sentence, that is to say, as one not confined to contracts entered into after the Act came into operation. If it can be so read, it would seem to be in effect an enactment that in every contract governed by Canadian law remaining undischarged at the date of the commencement of the Act a provision requiring the discharge of a monetary obligation in gold or gold coin is to be treated as void and that an obligation such as is contained in the bonds in the present case shall not receive the *Feist* construction (1), for it cannot have been intended to invalidate the obligation to pay what the Act calls the nominal or face amount of the obligation.

My Lords, I cannot think that s. 6 of the Act was intended to have so wide an operation. If such had been the intention of the Canadian Legislature, s. 4 of the Act would have been quite unnecessary. There would have been no point in providing for the method of discharging the "gold clause "obligations" if such obligations were themselves invalid to the extent that I have mentioned. In my opinion the better construction of s. 6 is to regard it as being confined to obligations entered into after the Act came into force, and, so construed, it could have no bearing upon the questions to be determined on this appeal even though the proper law of the contract were Canadian.

In these circumstances I do not find it necessary to consider the question, what is in truth the proper law of the contract, or the question whether, in view of the fact that the Act did not come into operation until after the hearing before Hilbery J., the appellants could have relied upon its provisions.

I agree that the order of the Court of Appeal should be varied in respect of the interest due on August 1, 1934, and

(1) [1934] A. C. 161.

that, subject to this, the appeal should be dismissed with costs.

H. L. (E.)
1938
NEW BRUNSWICK RY. CO. v. BRITISH AND FRENCH TRUST CORPORATION.

Decision of Court of Appeal varied as to construction and effect of interest coupons.

Solicitors for appellants: *Linklaters & Paines.*
Solicitors for respondents: *Allen & Overy.*

Considered. MAGOR AND ST. MELLONS R.D.C. *v.* NEWPORT CORPN. [1950] 2 All E.R. 1226.

[HOUSE OF LORDS.]

H. L. (E.)* OXFORD CITY COUNCIL . . . . . . APPELLANTS;

1938

Nov. 10, 11; *Dec.* 13.

AND

OXFORDSHIRE COUNTY COUNCIL . . RESPONDENTS.

Local government—Alteration of areas—Act extending boundary of city—Transfer of districts from county to city—Subsequent Act making county council the district road authority and the poor law authority—Increased burden on county ratepayers—Adjustment of financial relations—Increased burden whether due to extension Act or to subsequent Act—Arbitration—Amount of compensation—Oxford Extension Act, 1928 (18 & 19 *Geo.* 5, *c. lxxxiv.*), *ss.* 4, 5, 33, 61—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 62—*Local Government* (*Adjustments*) *Act,* 1913 (3 & 4 *Geo.* 5, *c.* 19), *s.* 1; *Schedule, Part II.* (1.), (2.), (3.)—*Local Government Act,* 1929 (19 & 20 *Geo.* 5, *c.* 17), *s.* 113, *sub-ss.* 1, 2; *s.* 117, *sub-s.* 4.

Where, after a change of boundaries between two local authorities has been carried out, a new duty is laid upon one of them involving a new burden upon its ratepayers, there is in such circumstances no increase of an existing burden as a consequence of that alteration of boundaries so as to justify a claim for financial adjustment between the two authorities.

In a consultative case before the Divisional Court it is desirable that, as in other cases, the Court should state the reasons for its decision.

Decision of Court of Appeal [1938] 2 K. B. 415 reversed.

APPEAL from a decision of the Court of Appeal (1) on a special case stated by an arbitrator.

I.—The following facts were agreed between the parties:—

1. On April 1, 1929, the Oxford Extension Act, 1928, came into operation.

2. That Act provided as follows:—

By s. 4 the existing boundary of the City and County Borough of Oxford was extended to include certain added areas—namely, part of the Headington urban district and parts of the Headington rural district and of the Woodstock

* *Present*: LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD PORTER.

(1) [1938] 2 K. B. 415.

H. L. (E.)

1938

OXFORD CITY COUNCIL v. OXFORDSHIRE COUNTY COUNCIL.

rural district, the added areas being in the administrative county of Oxford.

By s. 5 it was provided (inter alia) that parts of three parishes, i.e., Cutteslowe, Water Eaton and Wolvercot, which were formerly included in the Woodstock union, and were transferred to the city of Oxford under the said s. 4, should be included in the Headington union, part of which was already situate in the city of Oxford and the remainder in the county of Oxford. As a result the whole of the Woodstock union, as reduced, was within the county of Oxford, as reduced, and the Headington union, as enlarged, comprised part of the city of Oxford, as enlarged, and part of the county, as reduced.

By s. 33, provision was made for the equitable adjustment of financial relations between the county and county borough. That section provided :—

> "(1.) In any case . . . . where the extension of the "existing city by this Act or any other provision of this "Act affects any financial relations or questions between "those areas or any adjustment which has been made with "regard to the said distribution or financial relations or "questions, equitable adjustments may be made between "the areas interested.
>
> "(2.) Any such adjustment as is authorised by sub-s. 1 "of this section may be made by agreement between the "councils of the city, the county and the county borough "affected, or by an arbitrator appointed by those councils.
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> " . . . .
>
> "(3.) In any case in which an agreement for equitable "adjustments as aforesaid has not been made or so far as "any such agreement does not extend the provisions of the "[Local Government] Act of 1888 relating to adjustments "between administrative counties and county boroughs "shall apply with the necessary modifications. . . ."

Sect. 61 of the Act provided that : "Subject to the provisions "of this Act, s. 62 of the Act of 1888, shall apply to any "adjustment which may become necessary in consequence "of this Act and for the purposes of such application that "section shall have effect—

LOND UNIV.

"(*a*) As if in sub-ss. 5, 6, and 7 thereof the expression "'council' included any authority affected by this Act or "by anything done in pursuance of this Act; and

"(*b*) As if in the case of such authority not otherwise "empowered to borrow under any Act or on any security "or in any manner mentioned in the said sub-s. 6 that "subsection empowered the authority to borrow under any "Act relating to and conferring on the authority a power "to borrow on the security of all or any of the funds "rates and revenues of the authority and in the manner "provided by the said Act but without the consent of any "other authority and subject to the requirement that all "money so borrowed shall be repaid within such period "as the Minister may sanction:

"Provided that where the authority affected by this Act or "by anything done in pursuance of this Act are the board of "guardians of a poor law union s. 62 (adjustment of property "and liabilities) of the Act of 1888 shall apply with "respect to any necessary adjustment with the modifications specified in the First Schedule to the Poor Law "(Dissolution of School Districts and Adjustments) Act, "1900."

3. Sect. 62 of the Local Government Act, 1888, provides:—

"(1.) Any councils and other authorities affected by this "Act or by any scheme, order, or other thing made or done in "pursuance of this Act, may from time to time make agreements "for the purpose of adjusting any property, income, debts. "liabilities, and expenses so far as affected by this Act or such "scheme, order, or thing, of the parties to the agreement, and "the agreement and any other agreement authorised by this "Act to be made for the purpose of the adjustment of any "property debts liabilities or financial relations, may provide "for the transfer or retention of any property debts and "liabilities with or without any conditions, and for the joint "use of any property and for the transfer of any duties, and "for payment by either party to the agreement in respect of "property, debts, duties and liabilities so transferred or "retained, or of such joint user, and in respect of the salary, "remuneration, or compensation payable to any officer or "person, and that either by way of a capital sum or of a "terminable annuity for a period not exceeding that allowed "by the commissioners under this Act or the Local Government "Board.

"(2.) In default of an agreement as to any matter requiring "adjustment for the purpose of this Act, or any matter which, "in case of difference, is to be referred to arbitration, then, if "no other mode of making such adjustment or determining "such difference is provided by this Act, such adjustment or "difference may be made or determined by an arbitrator "appointed by the parties, or in case of difference as to the "appointment, appointed by the Local Government Board."

4.—(i.) By the Local Government (Adjustments) Act, 1913, it is provided:

" 1. (1.) On any adjustment under . . . . s. 62 of the Local "Government Act, 1888 . . . .—

"(*a*) . . . .

"(*b*) Provision shall be made for the payment to any "authority of such sum as seems equitable in accordance "with the Rules contained in Part II. of the Schedule to this "Act, in respect of any increase of burden which will "properly be thrown on the ratepayers of the area of that "authority in meeting the cost incurred by that authority "in the execution of any of their powers and duties as a "consequence of any alteration of boundaries or other "change in relation to which the adjustment takes place.

"(2.) This section shall apply to any adjustment made "(otherwise than by agreement) under any of the said sections "32 and 62 of the Local Government Act, 1888. . . . ."

(ii.) The Rules in Part II. of the Schedule are as follows:—

"(1.) Regard shall be had to—

"(*a*) The difference between the burden on the ratepayers "which will properly be incurred by the authority in meeting "the cost of executing any of their powers and duties and "the burden on the ratepayers which would properly have "been incurred by the authority in meeting such cost had "no alteration of boundaries or other change taken place;

H. L. (E.)
1938
Oxford City Council
v.
Oxfordshire County Council.

"(*b*) The length of time during which the increase of "burden may be expected to continue:

"Provided that no alteration of income in consequence of "an apportionment under Part I. of the Schedule shall be "taken into account.

"(2.) The sum payable to any authority in respect of the "increase of burden shall not exceed, or, if payable by instalments or by way of annuity, the capitalised value of the "instalments or annuity shall not exceed, the average annual "increase of burden multiplied by 15.

"(3.) Any sum payable in respect of the cost of the maintenance of main roads shall be payable by way of annuity."

(iii.) For the said multiple of 15 s. 5 of the Local Government (County Boroughs and Adjustments) Act, 1926, substituted the multiple of 21 so far as the increase is attributable to the cost of maintenance of roads.

5. Sect. 62 of the Act of 1888 was repealed by s. 307 of the Local Government Act, 1933, but is substantially re-enacted by s. 151 thereof.

6. The said provisions of the Act of 1913 were repealed by s. 307 of the Local Government Act, 1933, except as therein mentioned, but the rules aforesaid are substantially re-enacted by s. 152 and Sch. 5 thereof and applied to adjustments under the Act of 1888.

7. An increase of burden was thrown upon the ratepayers of the said rural district councils in the execution of their powers and duties as a road authority in consequence of the said extension, and upon the ratepayers in the area of the Woodstock board of guardians in the exercise of their functions as poor law authority in consequence of the transfer to the Headington union of the areas referred to in para. 2 hereof.

. . . .

9. On April 1, 1930, by virtue of the Local Government Act, 1929, the said rural district councils and all the other rural district councils in the county ceased to be highway authorities and the roads in all such rural districts which had hitherto been maintainable by the rural district councils thereof became

maintainable by the county council, and the cost thereof became payable by the county council and therefore chargeable upon the county ratepayers.

10. By s. 117 of the Act of 1929 provision is made whereby the road property and liabilities of a rural district council are transferred to and vest in the county council, and sub-s. 4 provides :—

"So much of any sum paid or payable to a district council "under the Local Government (Adjustments) Act, 1913, or "otherwise by way of adjustment on alteration of boundaries "or other change, as represents compensation to the council "in respect of the increase of the burden on the ratepayers "in meeting the cost incurred by that council in the execution "of their functions in respect of roads to which this section "applies and has not, on the appointed day, been exhausted "or applied in or towards the discharge of liabilities transferred "to the county council under this section or which would "have been so transferred if undischarged, shall, in the case "of a sum paid or payable to the district council by another "district council within the county, be repaid to that council, "and in any other case be paid to the county council.

"The sum payable by a district council to another council "under this sub-section shall be of such amount as may be "agreed between those councils, or, in default of agreement, "determined by an arbitrator appointed by the Minister, and "shall be paid either by a single payment or by annual instal-"ments, as may be determined by agreement between the "councils or by such arbitrator as aforesaid, and if paid by "a single payment, the payment shall be a purpose for which "the district council may borrow under the Public Health "Acts, 1875 to 1926.

"For the purposes of this subsection, unless the arbitrator, "for special reasons otherwise determines, a sum paid to a "district council by way of such adjustment as aforesaid shall "be deemed to be exhausted at the expiration of a period of "twenty years from the date on which the alteration of boun-"daries or other change took effect, and if the sum was payable "by instalments one-twentieth part shall be deemed to have "been paid to the council in respect of each year during that "period."

11. Further, by virtue of Part I. of the Act of 1929, the Woodstock board of guardians and the Headington board of guardians and all other boards of guardians in the city and in the county of Oxford as poor law authorities ceased to exist. The functions of the Woodstock board of guardians were transferred to the county council and the functions of the Headington board of guardians were transferred partly to the county council and partly to the city council, the county council becoming responsible for the area of the county as reduced and the city council for the area of the city as extended by the Act of 1928. The functions of all other boards of guardians whose unions or parts thereof were situate within the county as reduced were transferred to the county council.

12. By s. 113, sub-s. 1, of the Act of 1929, it is provided as follows :—

"(1.) Subject to the provisions of this Part of this Act "with respect to property and liabilities for which special "provision is made, any property and liabilities held or "incurred by or on behalf of a poor law authority whose area "is wholly comprised within one county or county borough "shall on the appointed day by virtue of this section be "transferred to and vest in the council of the county or "county borough."

By sub-s. 2 of s. 113 provision was made for the transfer, apportionment and adjustment of the property and liabilities of a poor law authority whose area was not wholly comprised within one county or county borough.

13. Claims for financial assistance were made upon the Oxford City Council by the Headington rural council, and by the Woodstock rural council, in respect of estimated increases of annual burden in regard to the maintenance of roads : and in April, 1931 (the Woodstock board of guardians and the Headington board of guardians having ceased to exist) a claim was made against the city council by the county council as successors to the guardians of the poor of the Woodstock

union in respect of an estimated increase of annual burden in regard to public assistance owing to the loss of the areas referred to in para. 2 hereof.

14. The aforesaid claims were suspended pending the decision of *Godstone Rural District Council* v. *Croydon Corporation* (1) in the Court of Appeal on July 22, 1932.

15. As a result of that decision the claims of the rural councils for compensation for increased burden in respect of roads were limited to the period between April 1, 1929, and April 1, 1930, and were settled on that basis, the amount of the annual burden having been agreed in the case of the Headington rural district council at 1925*l.* and in the case of the Woodstock rural district council at 650*l.*

16. On March 14, 1934, an agreement was reached between the parties hereto whereby the city council agreed to pay and paid to the county council the sum of 195,000*l.* in full settlement of all claims: "Save and except such claims "(if any) as the county council may be entitled to make for "increase of burden as from April 1, 1930, in respect of "(A) the maintenance of roads transferred to the county "council from district councils by the Local Government Act, "1929, and (B) the administration of public assistance."

17. On May 9, 1935, a claim was made by the county council upon the city council in respect of the said matters as follows:—

(A) In respect of increase of burden on county ratepayers in meeting the cost of maintenance and improvement of roads vested in the county council under the provisions of the Local Government Act, 1929.

	£
Estimated average annual increase of burden	5,850
Capitalized at twenty years' purchase	117,000
Capital sum claimed from the city council	117,000

(B) In respect of increase of burden on county ratepayers in meeting the cost of public assistance.

	£
Estimated average annual increase of burden	7,725
Capitalized at fourteen years' purchase	108,150
Capital sum claimed from the city council	108,150

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(1) (1932) 102 L. J. (K. B.) 34.

And on both these capital sums interest was claimed at 5 per cent. per annum from April 1, 1930, to date of payment.

18. The city council having refused to admit the said claim, on June 3, 1935, Sir Lynden Macassey, K.C., was appointed by agreement between the parties arbitrator concerning the same.

19. On October 17, 1935, at a preliminary hearing in this arbitration it was agreed between the parties that he should state this case for the decision of the Court upon the following question :—

II.—The legal question upon which the decision of the Court was desired was whether (as arbitrator) in considering what would be the future burden on county ratepayers he was to make provision for :

(A) The difference (if any) between the burden on the ratepayers of the county which would properly be incurred by the county council in meeting the cost of executing their powers and duties in respect of roads transferred to them by the Local Government Act, 1929, and the burden on the ratepayers which would properly have been incurred by the county council in meeting such cost had the alteration of boundaries made by the Oxford Extension Act, 1928, not taken place ;

(B) Or, alternatively, the increase of burden, if any, which would have been thrown upon the ratepayers lately in the rural districts of Headington and Woodstock after April 1, 1930, by reason of the said extension and for which the rural district councils would have obtained compensation if their functions as highway authorities had not been transferred to the county council under the Act of 1929 ;

(C) The difference (if any) between the burden on the ratepayers of the county which would properly be incurred by the county council in meeting the cost of executing their powers and duties in respect of the administration of public assistance and the burden on the said ratepayers which would properly have been incurred by them in meeting such cost had the said alteration of boundaries not taken place ;

(D) Or alternatively the increase of burden, if any, which would have been thrown upon the ratepayers lately in the area of the Woodstock board of guardians after April 1, 1930, by reason of the transfer of parts of parishes to the Headington union had not the boards of guardians ceased to exist under the provisions of s. 1 of the Act of 1929.

III.—It was contended on behalf of the county council:

(1.) That in the adjustment under s. 62 of the Local Government Act, 1888, which had become necessary in consequence of the Oxford Extension Act, 1928, provision had to be made for the payment to the county council of such a sum as seemed to the arbitrator equitable in accordance with the Rules contained in Part II. of the Local Government (Adjustments) Act, 1913, in respect of any increase of burden which would properly be thrown on the ratepayers of the county in the execution of the county council's powers and duties as highway authority and/or in the matter of public assistance in consequence of the alteration of boundaries made by the Act of 1928.

(2.) That if in fact any difference could be shown between the burden on the said ratepayers which would properly be incurred by the county council in meeting the cost of maintenance of roads and/or in the matter of public assistance and the burden upon them which would properly have been incurred by the county council in meeting such cost had the alteration of boundaries not taken place, that difference was one for which the arbitrator was bound to provide.

(3.) That any increase of burden arrived at in manner set out in (2.) of these contentions was an increase of burden thrown upon the said ratepayers as a consequence of the alteration of boundaries.

(4.) That the arbitrator was at liberty to take into account matters which would not have been available had the adjustment or arbitration been concluded prior to the passing of the Act of 1929—namely, the transfer of the burden of the maintenance of roads from the rural district councils and of the poor law functions of the Woodstock board of guardians to the county council.

(5.) That as regards the claim in respect of road maintenance, if the adjustment between the rural councils and the city council had been made before the passing of the 1929 Act the amounts included in the compensation to the rural district councils in respect of the increase of burden on the ratepayers of the rural districts so far as it related to the period after the powers and duties of the rural district councils were transferred to the county council would have been paid to that council under the provisions of s. 117, sub-s. 4, of that Act.

(6.) That as regards the claim in respect of poor law functions, if the adjustment between the Woodstock and Headington boards of guardians had been made before the passing of the 1929 Act, the amount of compensation to the Woodstock board of guardians in respect of the increase of burden on the ratepayers in their area, so far as it formed part of their property at April 1, 1930, would have been transferred to and vested in the county council under s. 113 of that Act.

(7.) That if on the other hand the extension had taken place on or after April, 1930, the city council would be liable to pay to the county council a sum arrived at in manner set out in (2.) of these contentions.

(8.) That, unless the contentions of the county council were correct, alterations of boundaries brought about so shortly before April 1, 1930, that it was impossible to complete the adjustment before that date would not (like all other alteration of boundaries) carry with it the obligation to compensate ratepayers injuriously affected.

(9.) That if the above contentions (1.) to (4.) failed the county council ought to receive the same amount as they would have received from the rural councils and from the Woodstock board of guardians had the adjustment between these authorities and the city council been concluded before the Act of 1929 was passed and without taking account of that Act and that the arbitrator ought to provide for such amount.

IV.—The city council disputed each of the contentions of the county council with the exception of that numbered (4.). They also contended—

(1.) That the powers and duties referred to in s. 1 of the Local Government (Adjustments) Act, 1913, and the rules in

Part II. of the Schedule thereto were conferred or imposed on the authority by subsequent legislation.

(2.) That any increase in the burden on the ratepayers of the county in the matter of roads vested in the county council under the Act of 1929 or in the matter of public assistance was not a consequence of the Act of 1928, but of the Act of 1929.

(3.) That the Act of 1929 made no provision for compensation for increased burden resulting to any authority or ratepayers as a consequence of its provisions.

V.—The question for the Court was: Whether or not the arbitrator ought in determining the sum, if any, to be paid in respect of increase of burden on the ratepayers of the county of Oxford, to have regard to any and which of the matters set out in para. II. (A), (B), (C) and (D) hereof.

Annexed to the special case was a print of the submission to arbitration, from which it appeared that the arbitrator was appointed under either s. 33 or s. 61 of the Act of 1928 to determine what adjustments should be made between the county council and the city council in consequence of the alteration of the city boundaries by the Act of 1928.

On May 24, 1937, the Divisional Court gave judgment answering the questions submitted to it in and by the special case in the negative by declaring that regard should not be had to any of the matters set out in para. II. of the special case.

The Oxfordshire County Council gave notice of appeal dated June 7, 1937, for an order that the judgment of the Divisional Court might be rescinded, and that it might be ordered that the said question be answered in the affirmative —namely, that regard should be had to the matters set out in sub-paras. (A) and (C) in the said paragraph, or alternatively to the matters set out in sub-paras. (B) and (D) thereof.

The Court of Appeal (Greer and MacKinnon L.JJ., Bennett J. dissenting) allowed the appeal, holding that, although the burden of the maintenance of district roads and of public assistance would not have been thrown upon the ratepayers of the county at all unless the Act of 1929 had come into force, yet such increase of that burden as might be attributable to the transfer of the above mentioned areas from the county to the city was a consequence not of that Act but of the Oxford Extension Act, 1928, and that provision for it should, therefore, be made by an arbitrator appointed under the last mentioned Act to determine what sum should be paid by way of financial adjustment by the city to the county in respect of the transfer of these areas; and further (by Greer and MacKinnon L.JJ.), regard being had to the maximum amounts payable by way of compensation under the Rules contained in the Local Government (Adjustments) Act, 1913, Schedule, Part II., as amended by the Local Government (County Boroughs and Adjustments) Act, 1926, s. 5, and to the fact that during the year intervening between the dates on which the Acts of 1928 and 1929 respectively came into force the county did not incur any liability in respect of these matters, that the sum payable by the city to the county as compensation should comprise in respect of roads the average annual increase of burden for twenty years, and in respect of public assistance the average annual increase of burden for fourteen years.

The Oxford City Council appealed.

Cyril Radcliffe K.C., *Maurice Fitzgerald* K.C. and *R. D. Stewart-Brown* for the appellants. There cannot be an increase of burden cast upon a local authority which will justify a claim for a financial adjustment consequent upon an alteration of boundaries where the burden in respect of which the claim is made is imposed by legislation subsequent to the transfer of areas between the two authorities as was the case here: see *Godstone Rural District Council* v. *Croydon Corporation.* (1) In such a case as this the burden cast upon the county council is in no way due to the alteration of boundaries; it is imposed by the new legislation. They also referred to *Caterham Urban District Council* v. *Godstone Rural District Council.* (2)

R. M. Montgomery K.C. and *S. Cope Morgan* for the respondents. The decision of the majority of the Court of Appeal was right and should be affirmed. The fact that the respondents have had an area taken from them and added

(1) 102 L. J. (K. B.) 34.

(2) [1904] A. C. 171.

to the appellants' area gives ground for a claim for a financial adjustment. Additional cost has been cast upon the respondents by reason of the alteration of boundaries in respect of which they are entitled to be compensated. What has to be considered is the contrast between the rates which the respondents will now in fact require to levy and those which would have been required had the resources of a beneficial area not been taken from them. [They referred to *Rex* v. *Minister of Health.* (1)]

Cyril Radcliffe K.C. in reply. The powers and duties to be considered are those in being at the time when the transfer is made; and it cannot be right to say that a burden which came into existence for the first time in 1930 is one as to which the respondents are entitled to be compensated.

The House took time for consideration.

1938. Dec. 13. LORD ATKIN. My Lords, I have had the opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Russell of Killowen; and as I entirely agree with it I find it unnecessary to repeat the reasons for restoring the decision of the Divisional Court. I wish to add that I share the views about to be expressed by my noble and learned friend Lord Wright as to the desirability of reasons being given by the Divisional Court on a consultative case.

LORD THANKERTON. My Lords, I have had the privilege of considering the opinion which is about to be delivered by my noble and learned friend Lord Russell of Killowen, and I desire to express my complete concurrence in it.

LORD RUSSELL OF KILLOWEN. My Lords, by the Oxford Extension Act, 1928, which came into force on April 1, 1929, the boundary of the City and County Borough of Oxford was extended so as to include areas which were formerly in the Administrative County of Oxford—namely, a part of

(1) [1921] 1 K. B. 1.

Headington Urban District, a part of Headington Rural District and a part of Woodstock Rural District. By the same Act, parts of three parishes were transferred from the Woodstock Poor Law Union, which was wholly situate in the Administrative County of Oxford, to the Headington Poor Law Union, which was situate partly in the County Borough of Oxford and partly in the Administrative County of Oxford.

In consequence of this extension an increase of burden was thrown upon the ratepayers of the two rural districts in meeting the cost incurred by the rural district councils in the execution of their powers and duties as highway authorities; and, in consequence of the transfer of part of their area to the Headington union, an increase of burden was thrown upon the ratepayers in the area of the Woodstock board of guardians in meeting the cost incurred by that board in exercise of their functions as poor law authority.

On April 1, 1930, by virtue of the Local Government Act, 1929, the rural district councils of Headington and Woodstock ceased to be highway authorities; and the roads which had hitherto been maintainable by those councils respectively became maintainable by the respondents. The cost thereof became chargeable upon the county ratepayers.

By virtue of the same Act, and on the same date, the Woodstock board of guardians and the Headington board of guardians ceased to exist. The functions of the Woodstock board were transferred to the respondents. The functions of the Headington board were transferred partly to the appellants and partly to the respondents.

The Oxford Extension Act, 1928, contained provisions (ss. 33 and 61) the purpose of which was to enable the authorities from which what I may call "beneficial areas" had been taken, to obtain financial adjustment from the appellants to whose area they had been added. Sect. 33 provides for such adjustment being made by agreement or arbitration. Sect. 61 enacts that s. 62 of the Local Government Act, 1888, "shall "apply to any adjustment which may become necessary in con-"sequence of this Act and for the purposes of such application

H. L. (E.)
1938

OXFORD CITY COUNCIL v. OXFORDSHIRE COUNTY COUNCIL.

Lord Russell of Killowen.

" that section shall have effect (*a*) as if in sub-sections (5), "(6) and (7) thereof the expression 'council' included any "authority affected by this Act or by anything done in "pursuance of this Act."

By a decision of your Lordships' House in the case of the *Caterham Urban District Council* v. *Godstone Rural District Council* (1) it was established that an arbitrator had no power in making an adjustment under the Local Government Act, 1888, to take into account the loss occasioned to ratepayers by the taking away from a rural district council of a beneficial area. This state of affairs was subsequently modified by the Local Government (Adjustments) Act, 1913; and since the present appeal depends, as I think, upon the true construction of that Act, I state its relevant provisions verbatim. They run thus: " 1.—(1.) On any adjustment under . . . . section "sixty-two of the Local Government Act, 1888. . . . . (*b*) "Provision shall be made for the payment to any authority "of such sum as seems equitable in accordance with the rules "contained in Part II. of the Schedule to this Act in respect "of any increase of burden which will properly be thrown on "the ratepayers of the area of that authority in meeting the "cost incurred by that authority in the execution of any of "their powers and duties as a consequence of any alteration "of boundaries or other change in relation to which the "adjustment takes place.

" (2.) This section shall apply to any adjustment made "(otherwise than by agreement) under any of the said sections "thirty-two and sixty-two of the Local Government Act, "1888, and sixty-eight of the Local Government Act, 1894, "whether as originally enacted or as applied in England or "Wales by any other Act, or by any Provisional Order, or "by any order made or confirmed by the Local Government "Board under the Local Government Act, 1888, or the Local "Government Act, 1894, and consequent on an alteration of "boundaries or other change effected after the passing of "this Act."

Part II. of the Schedule is in the following terms:—

(1) [1904] A. C. 171.

"*Rules for determining sum to be paid in respect of increase of* "*burden on ratepayers.*

"(1.) Regard shall be had to—

"(*a*) The difference between the burden on the ratepayers which will properly be incurred by the authority "in meeting the cost of executing any of their powers and "duties and the burden on the ratepayers which would "properly have been incurred by the authority in meeting "such cost had no alteration of boundaries or other change "taken place;

"(*b*) The length of time during which the increase of "burden may be expected to continue

"Provided that no alteration of income in consequence of an "apportionment under Part I. of the Schedule shall be taken "into account.

"(2.) The sum payable to any authority in respect of the "increase of burden shall not exceed, or if payable by instalments or by way of annuity, the capitalised value of the "instalments or annuity shall not exceed the average annual "increase of burden multiplied by fifteen.

"(3.) Any sum payable in respect of the cost of the maintenance of main roads shall be payable by way of annuity."

The multiple of fifteen was subsequently increased by legislation to twenty-one so far as the increase of burden is attributable to roads; but this is immaterial.

Claims for financial adjustment were made upon the appellants by the two rural district councils in respect of the estimated increases of annual burden on the ratepayers of their respective areas in regard to the maintenance of highways. These were settled on the basis that, owing to the provisions of the Local Government Act, 1929, the burden (and therefore the increase) could have existed for one year only, a sum of 1925*l.* being paid to Headington and a sum of 650*l.* being paid to Woodstock.

Claims for financial adjustment were also made by the respondents against the appellants, who agreed to pay and paid a sum of 195,000*l.* in full settlement of all the respondents' financial claims arising out of alteration of areas, other than such claims (if any) as the respondents might be entitled to make for increase of burden as from April 1, 1930, in respect of the maintenance of the roads transferred to them from the two district councils by the Local Government Act, 1929, and in respect of the administration of public assistance. Subsequently the respondents sent in two alternative claims against the appellants in respect of each of these matters. The appellants refused to admit any of the four claims, and Sir Lynden Macassey was appointed by the parties to arbitrate between them. By agreement he stated a consultative case for the decision of the Court. In paragraph II. of the special case he states the four claims, the two alternative claims in respect of increase of burden on county ratepayers in meeting the cost of road maintenance being set out under heads (A) and (B) respectively, and the two alternative claims in respect of increase of burden on county ratepayers in meeting the cost of public assistance being set out under heads (C) and (D) respectively.

The arbitrator stated the question for the decision of the Court in the following words: "Whether or not I ought in "determining the sum (if any) to be paid in respect of increase "of burden on the ratepayers of the Administrative County "of Oxford, to have regard to any and which of the matters "set out in paragraph II. (A), (B), (C) and (D) hereof." The question does not seem to me to have been very happily worded. The alternative claims were the only matters in dispute, but the question as framed is perhaps consistent with the view that even if no regard is to be paid to any of the matters referred to, a sum might nevertheless be payable. In truth the point of law for determination was whether the respondents were entitled to make any claim upon the appellants in respect of any alleged increase of burden on the county ratepayers in meeting either the cost of maintenance of roads vested in the County Council under the Local Government Act, 1929, or the cost of public assistance.

The Divisional Court answered the question in the negative, "that regard should not be had to any of the matters set "out in paragraph II. of the Special Case." They gave no reasons, following in that respect (which I think is a matter for regret) the old practice which arose and prevailed when there was no appeal from the decision.

On appeal the Court of Appeal disclosed very divergent views. Greer L.J. thought that the arbitrator should have regard to the matters set out in paragraph II. (A) and (C) of the Special Case. MacKinnon L.J. was of opinion that he should not have regard to those matters, but to matters approximating or similar to those set out in paragraph II. (B) and (D). Bennett J. was in favour of dismissing the appeal. The formal order of the Court of Appeal answered the question in the affirmative. The true result which emerges at this stage is, I think, that the majority were of opinion that the claims were good in law, and that the arbitrator should proceed to settle the amounts, aided in his task by the judgments delivered, and with power, no doubt, if still in difficulty, to apply for and obtain further assistance.

The question for our determination now is, as I conceive it, whether the claims are good in law. This in turn depends upon the true construction of the Local Government (Adjustments) Act, 1913; for it is conceded, and rightly so, by the respondents that the basis of their claims must be found in that Act, or, to put the position in another way, unless they can bring themselves and their claims within the language of the 1913 Act, the claims would be bad in law under the *Caterham* decision. (1)

My Lords, once we reach it, the point is a short one, and in my opinion reasonably plain. But for the fact that two members of the Court of Appeal (whose opinions I hold in great respect) have taken different views, I would, speaking for myself, have been content to concur with the judgment of Bennett J. He has covered the whole ground and I agree with his conclusions and the reasoning upon which they are founded. As he truly says, the crux of the matter upon which the whole case depends is whether the language of s. 1 of the Act of 1913 can be fitted to the facts of the present case; or, conversely, whether the respondents and their claims in

(1) [1904] A. C. 171.

question, can be fitted into that section. I agree with him that the words of the section do not apply to a case (such as the present) where, subsequently to an accomplished change of boundaries, a new duty is laid upon a local authority, and a new burden is laid on the ratepayers of that authority to enable the local authority to discharge the new duty. In such a case there is no increase of an existing (or indeed any) burden as a consequence of an alteration of boundaries.

I would only add that in my opinion s. 1, sub-s. 1 (*b*) of the Act of 1913 postulates by its language the existence of two burdens (a smaller burden and a larger burden) each of which is thrown on the ratepayers of the area of one and the same authority in meeting the cost incurred by that authority in executing any of its powers and duties, the burden becoming larger as a consequence of an alteration of the authority's boundaries; that is to say it postulates an authority imposing a burden on the ratepayers of its unreduced area, and the same authority subsequently imposing a larger burden on the ratepayers of its reduced area.

Arguments were addressed to us founded upon the phraseology of Part II. of the Schedule; but the wording of these rules for measuring the sum (if any) payable under the provisions of s. 1, throws no useful light on the question of what circumstances must exist before any sum is payable at all.

An argument was also based upon s. 117, sub-s. 4, of the Local Government Act, 1929. That sub-section, so far as material, runs thus: " So much of any sum paid or payable "to a district council under the Local Government (Adjustments) Act, 1913, or otherwise by way of adjustment on "alteration of boundaries or other change, as represents "compensation to the council in respect of the increase of "the burden on the ratepayers in meeting the cost incurred "by that council in the execution of their functions in respect of "roads to which this section applies and has not, on the "appointed day, been exhausted or applied in or towards the "discharge of liabilities transferred to the county council "under this section or which would have been so transferred "if undischarged, shall in the case of a sum paid or payable "to the district council by another district council within the "county, be repaid to that council, and in any other case be "paid to the county council." That sub-section might no doubt have entitled the respondents to receive moneys from the appellants if any adjustment moneys had still been payable by the appellants to either of the two rural district councils. But nothing was payable. The sub-section has no application to the facts of this case; and it certainly does not operate to vest in the respondents a right to the compensation for increase of burden which the two rural district councils might have been entitled to receive from the appellants had their functions as highway authorities not been transferred to the respondents by the Local Government Act, 1929.

There is a further consideration which appears to me very material. It was the later Act of 1929 that altered the status quo, and it is in that Act that one would expect to find the results of the alteration dealt with. It is therefore natural to find the subject of compensation for loss of a beneficial area dealt with in s. 117 of the Act of 1929. The fact that the provision there made is limited in such a way that it does not include the present claim must be taken, in my opinion, to show the limited extent to which Parliament intended to remedy the consequences of the alteration of the status quo as regards this subject matter, although it was clear that it restricted the period in respect of which the superseded authorities could claim.

For the reasons stated I am of opinion that the claims put forward by the respondents are bad in law. I would discharge the order of the Court of Appeal and restore the order of the Divisional Court. The respondents should pay the costs of the appellants both here and in the Court of Appeal.

LORD WRIGHT. My Lords, I have had the advantage of reading in print the opinion just delivered by my noble and learned friend Lord Russell of Killowen. I agree so completely with it that I do not desire to add anything.

There is a matter which arises incidentally on which I should like to make an observation. Your Lordships, I know, were sorry not to have the benefit of a reasoned judgment from the Divisional Court or to be helped by the great experience of the judges of the King's Bench Division in these matters. I understand that the practice has been adopted of answering the questions presented by a consultative case in an arbitration by a simple " yes " or " no," without detailed reasons. This, I think, is a comparatively recent practice, perhaps of about fifteen years standing, adopted because when there were three judgments, one from each of the judges in the Divisional Court, there was scope for differences of statement in the reasons, and this was liable to lead to confusion and to further litigation. While I recognize the force of this way of looking at the position, I cannot help observing that now, when an appeal from the Divisional Court has been given in these cases, subject to leave, a reasoned judgment of the Divisional Court is likely to be of great value. Not only is it certain to help the appellate Court, but it may often prevent an appeal, when a possible appellant has an opportunity of appreciating the weight of the reasoning on which the Divisional Court has proceeded. The difficulty which might well arise from there being more than one judgment might, it seems, be obviated by a practice of having a single reasoned judgment, which constitutes the judgment of the Court, a practice frequently adopted in the Court of Appeal and the Divisional Court, while in this House there is often a single speech in which the other learned Lords concur. It may be that the change in the law effected by the Arbitration Act, 1934, may afford a suitable occasion to make some such change. But I must not be taken to be suggesting to the Lord Chief Justice and the judges of the King's Bench Division what form their practice should take. I merely venture on an observation which has occurred to me in considering this case.

LORD PORTER. My Lords, I concur in the opinion delivered by my noble and learned friend Lord Russell of Killowen, and I also concur in the views expressed by my noble and learned friends Lord Atkin and Lord Wright. I, too, think that it would be of great assistance to your Lordships' House to have the advantage of knowing the grounds upon which the Divisional Court have come to their conclusions.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for A. Holt, Town Clerk, Oxford.*

Solicitors for respondents: *Cunliffe & Airy, for F. G. Scott, Clerk to Oxfordshire County Council, Oxford.*

[HOUSE OF LORDS.]

HARRIS . . . . APPELLANT;

AND

ASSOCIATED PORTLAND CEMENT MANUFACTURERS, LIMITED . . } RESPONDENTS.

H. L. (E.)*
1938
Oct. 31;
Nov. 1;
Dec. 15.

Workmen's compensation—Accident arising out of the employment—Workman in course of employment drying his leggings near turbine—While doing so going too near revolving fan, in which his hand was caught—Workmen's Compensation Act, 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 1.

An act done by a workman in the course of and arising out of his employment is not removed from the scope of s. 1 of the Workmen's Compensation Act, 1925, merely because it was done in an extremely negligent, reckless, rash, or foolish way.

The appellant's work involved his standing in water, and before doing so, he, like the other workmen similarly employed, tied sacking round the bottom of his trousers to keep them dry. It was part of his duty to see that the sacks after being so used were dried so that they could be available on the following day. It was the recognized practice to dry the sacks at or near an electric fan in a turbine in the motor room. While attempting on one occasion to place the sacking near the fan, which was revolving, the appellant's hand was caught by the fan and severed. On a claim for compensation in respect of this under the Workmen's Compensation Act, the county court judge found that while the appellant, in seeking to dry the sacking, was doing something in the course of his employment, he by putting the sacking in such close proximity to the fan incurred a peril which no workman without extreme rashness would have undertaken, and there being nothing in the contract of employment which obliged him to put his hand within the turbine the act was outside his employment and therefore that he was not entitled to compensation. The Court of Appeal affirmed the county court judge:—

Held, allowing the appeal (Lord Russell of Killowen dissenting), that once it was found that the act which the appellant was seeking to do was within the scope of his employment, the question of negligence, great or small, in doing the act was irrelevant.

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANUFACTURERS.

Per Lord Atkin: No amount of negligence in doing an employment job can change the workman's act into a non-employment job. *Stephen* v. *Cooper* [1929] A. C. 570 discussed and distinguished.

APPEAL from a decision of the Court of Appeal.

The appellant workman, who was in the employment of the respondents, having sustained injury by accident, claimed compensation under the Workmen's Compensation Act. His claim was heard in the Dartford County Court, when the following facts were admitted or proved: The appellant's work in the cleansing of washmills involved his standing in water, and in doing this he, like all the other workmen similarly employed, tied sacking round the bottom of his trousers to keep them dry. It was part of the appellant's duty to see that the sacks which had been so used were dried so that they could be available on the next day. It was a recognized practice to dry the sacks at or near an electric fan of a turbine in the motor room. On December 11, 1936, the appellant went to the motor room and found that another man's sacking was being dried near or under the fan. In an attempt to dry his own sacking at the fan, the appellant got down on one knee and had to exercise pressure and spread out his sacking to withstand the draught. As he was putting his sacking on the floor or near the fan he put his right hand near the fan which was revolving, and the draught or fan caught the sacking, and his hand was caught also and was severed. In consequence the appellant was totally incapacitated for a considerable time, and was partially incapacitated at the date of the hearing of his application for compensation.

The county court judge held that the appellant was obliged to dry his sacking and was entitled to dry it somewhere within the benefit of the draught of the turbine; that in drying his sacking in the motor room the appellant was doing something which was in the course of his employment in fact and in law; that the appellant in extreme rashness put his sacking inside the casing behind the iron brace of the turbine in close proximity to the revolving fan and pushed the sacking in, and that he incurred a peril which no workman without acting with extreme rashness would have undertaken; and

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANUFACTURERS.

that there was nothing in the contract of employment which obliged the appellant to put his hand within the turbine; that the act was therefore outside his employment, with the consequence that he was not entitled to compensation.

On appeal by the workman, the Court of Appeal (Sir Wilfrid Greene M.R., and Romer and MacKinnon L.JJ.) held that the county court judge had rightly addressed himself to the question before him, and the substance of his finding of fact was that the appellant's act was one of extreme rashness. That finding was sufficient to justify the judge in holding that the accident did not arise out of and in the course of the employment. Where an act was merely negligent it was not for that reason taken out of the scope of the employment. Negligence on the part of a workman was to be expected, but there might be such rashness as to take it out of the category of mere negligence. The question was really one of fact and degree, and the county court judge was entitled on the facts to find as he did.

The appellant appealed to this House.

1938. Oct. 31, Nov. 1. *Gerald Thesiger* for the appellant. There being an implied finding by the county court judge that the appellant was doing something which he was employed to do, although he acted rashly in doing it, that fact does not disentitle him from obtaining compensation. There is certainly no finding that the act was an act of bravado done for the appellant's own purposes. In *Keen* v. *St. Clement's Press, Ld.* (1), where a workman had his hand injured while putting a tin of condensed milk on a ledge immediately under the running machinery, Cozens-Hardy M.R. said that there was not a particle of evidence to show that this was a permitted mode of doing what was done; in other words that the act was outside the scope of the employment. Here the act was part of the appellant's duty. In *Blair & Co., Ld.* v. *Chilton* (2) this House held that the workman though doing his work in the wrong way was nevertheless acting within the sphere of his employment, and therefore it could be said that the accident arose out

(1) (1914) 7 B. W. C. C. 542.
(2) (1915) 8 B. W. C. C. 324.

of and in the course of the employment. In *Stephen* v. *Cooper* (1) a farm servant was employed to drive a reaping machine drawn by two horses. While driving it, one of the chains became detached, whereupon the man stopped the machine, and, without putting the cutting blade out of gear, attempted to walk along the pole between the horses to refix the chain, when the pressure of his weight upon the pole made the horses start forward, with the consequence that he fell from the pole on to the cutting blade and was seriously and permanently injured. On these facts it was held that the risk taken by the servant was not incidental to his employment ; it was an added peril due to his own voluntary conduct. That was a very different case from this.

[LORD THANKERTON. There what the servant did was a deliberate act of bravado.]

Thomas v. *Ocean Coal Co.* (2) is an authority in favour of the appellant. There it was held that the accident was to be deemed to have arisen out of and in the course of the employment notwithstanding that at the material time the workman was acting in contravention of a statutory regulation.

Denning K.C. and *R. M. Wilson* for the respondents. There is no finding that the act done by the appellant was done in connection with the employers' business, and unless that can be established the claim must fail : see per Lord Russell of Killowen in *Knowles* v. *Southern Ry. Co.* (3)

[LORD ATKIN. What the appellant was doing was no doubt for his own purpose, but it was likewise for the purpose of the employers' business.]

The act of drying the sacking was not actual work : it was merely doing something equivalent to the man taking off his coat. He was not employed to do this : see per Lord Sumner in *Baker* v. *Bradford* (*Earl*) (4), where a workman was doing something which exposed him to an added peril not incidental to the employment. See also to the like effect *Lancashire and Yorkshire Ry. Co.* v. *Highley* (5) ; *Tucknott* v. *East*

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(1) [1929] A. C. 570.
(2) [1933] A. C. 100.
(3) [1937] A. C. 463, 472.
(4) (1916) 9 B. W. C. C. 436.
(5) [1917] A. C. 352.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANUFACTURERS.

Sussex County Council. (1) No one would have dreamt of putting his hand into the turbine as the appellant did. There was no misdirection and there was evidence justifying the county court judge's finding.

Gerald Thesiger replied.

The Court took time for consideration.

Dec. 15. LORD ATKIN. My Lords, this is an appeal from a decision of the Court of Appeal affirming a decision of the learned county court judge at Dartford, who, in a claim under the Workmen's Compensation Act, made his award in favour of the employers. The material facts are simple: the workman, being employed at times to stand in water, in accordance with a recognized practice of the workmen used sacking to protect his trousers. In the course of his employment he was entitled to dry the sacking at the end of each day. He was permitted by his employers to dry the sacking either at a stove or at the unfenced orifice of the revolving fan of a turbine in the motor room. On the day in question he chose to dry his sacking at the fan. Finding other sacking there that a fellow workman was drying he placed his own sacking nearer the orifice, having to hold it there to resist the outward draught. He placed his sacking, held in his hand, too near the fan, in fact within the casing of the fan. The sacking was caught by the fan, the man's right hand was also caught and was severed by the blades of the fan. The judge's view was that though in drying the sacking the man was doing something in the course of his employment, yet as he was acting with extreme rashness he was not entitled to an award. After referring to a passage in the opinion of Lord Hailsham in *Stephen* v. *Cooper* (2) he said that there was nothing in the contract of employment which obliged the applicant to put his hand within the base of the turbine.

In the Court of Appeal the Master of the Rolls said that while mere negligence did not take an act out of the scope of the workman's employment, there may be such rashness as to take it out of the category of mere negligence. The question was really one of fact and degree. "The act may "be one of mere ordinary negligence, or it may be so rash and "foolish that no sensible workman would ever do it." The judge had placed the act in the latter category. Romer L.J. said that the question was whether this was an act done by the workman negligently but within the scope of his employment or an act done in such a manner as to be something outside the scope of his employment. In each case it was a question of degree and therefore a question of fact to be determined by the county court judge.

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(1) (1935) 28 B. W. C. C. 42.

(2) [1929] A. C. 570.

My Lords, I regret to find myself in complete disagreement with the county court judge and the Court of Appeal on this matter. In my opinion only one conclusion arose in law from the facts found by the county court judge and that was that the injury to the workman was caused by accident arising out of and in the course of his employment. I cannot assent to the doctrine that though a man may be doing a piece of work within his employment, and may still be within his employment if he does it carelessly, yet if he does the same piece of work very carelessly he may be found to be doing something outside his employment. Once you have found the work which he is seeking to do to be within his employment the question of negligence, great or small, is irrelevant: and no amount of negligence in doing an employment job can change the workman's action into a non-employment job. With great respect it is not a question of degree, and does not give rise to a question of fact. The nature of the act is not altered in kind by the degree of negligence with which it was done. There is always, of course, the initial question whether the work the man was seeking to do was within the scope of his employment or not and whether he was seeking to do it as part of his employment. This is the question of fact that arose in *Stephen* v. *Cooper* (1), where a farm servant driving a reaping machine drawn by two horses had to refix a chain trace which had become loose. He chose to leave the machine in gear and to walk along the pole to reach the necessary spot:

(1) [1929] A. C. 570.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANU-
FACTURERS.
Lord Atkin.

the horses started forward: he fell and was seriously injured. One can imagine an arbitrator finding that he was merely doing an employment job very carelessly: what he did find was that "the appellant's act in balancing himself on and in "walking along the sloping pole was not done 'for the purposes " 'of and in connection with his employer's trade or business,' "but was a foolhardy act of bravado": see 1928, Sess. Cas. p. 339, Finding (27.). On this finding of fact, which had to be accepted as conclusive, the applicant necessarily failed. The case did not raise the question of the degree of negligence in doing an employment act turning the act into something outside the employment, and I find nothing in the speeches delivered in this House to support that view. The fact is that the workman's negligence in doing his job is one of the most fruitful causes of injury; and, if it would in any degree preclude compensation, the benefits of the Act would be seriously impaired. In truth the negligence of the workman is as much a risk of his employment as the negligence of his fellow workmen. In my opinion if a workman is doing an act which is within the scope of his employment in a way which is negligent in any degree and is injured by a risk incurred only by that way of doing it he is entitled to compensation. One must of course bear in mind the work which he is employed to do, and the place in which he is employed to do it. Some confusion has been introduced into the cases by treating accidents which arose in out-of-employment places as though they were cases of negligence. Still more by the unfortunate misapplication of the expression, valuable enough in its right context, of "added risk." In a sense every man who does his appointed work negligently adds to the risks of his employment done carefully the risk of that employment done carelessly. In fact the "added risk" might, I think, more correctly be called a "different risk," i.e., the risk in doing something which is not within his employment at all.

In the present case I think that both the county court judge and the Court of Appeal have attached too much importance to the case of *Stephen* v. *Cooper* (1) and to one sentence taken from the speech of Lord Hailsham. I will cite once more the words of Lord Loreburn in *Blair & Co., Ld.* v. *Chilton* (1), assented to by all the members of the House. "My Lords, this is an appeal in a case under the Workmen's "Compensation Act, which is an Act lending itself to infinite "refinement. The words of the Act itself rule in every case. "Previous decisions are illustrations of the way in which "judges look at cases, and in that sense are useful and suggestive; but I think we ought to beware of allowing tests or "guides which have been suggested by the Court in one set "of circumstances, or in one class of cases, to be applied to "other surroundings, and thus by degrees to substitute them-"selves for the words of the Act itself." If this warning had been regarded in the last twenty-three years what a "wagon-"load of cases" we should have been spared. In that case a boy was employed to turn a wheel in a rolling machine. He had express orders not to sit at the work as it was dangerous. He did sit and was injured. The members of this House agreed with Pickford L.J., who said: "This, I think, is doing "his work in a wrong way, and not doing something outside "his sphere."

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(1) [1929] A. C. 570.

I think I ought to say a word about the sentence in the speech of Lord Hailsham which the learned county court judge followed and the Master of the Rolls cited in support of his judgment. In *Stephen* v. *Cooper* (2) cited above, Lord Hailsham said: "It is well established by a series of decisions "in your Lordships' House that, apart altogether from the "question of serious misconduct, if the accident arises from some "peril to which the workman has exposed himself by his "own conduct and which he was not obliged to encounter "by any terms of his contract of service, the accident cannot "be said to arise out of his employment." He quotes *Plumb* v. *Cobden Flour Mills Co.* (3), where a man employed to stack bundles of sacks in a room which had no machinery chose to use a revolving shaft in the room and was injured by the improvised machinery so set in motion. He was obviously

(1) 8 B. W. C. C. 324, 325.
(2) [1929] A. C. 570, 573.
(3) [1914] A. C. 62.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED PORTLAND CEMENT MANUFACTURERS.
Lord Atkin.

not doing an act within his employment and it was so held. He also cites *Lancashire and Yorkshire Ry. Co.* v. *Highley* (1), where it was held that a man crossing the lines between the trucks of a supposed stationary train was not entitled to compensation. It is plain that the Lord Chancellor was addressing himself to the facts of the case before him and was merely purporting to restate the well known test that a workman to recover compensation must be doing something he was employed to do. With great respect, however, I think that in this connection the word "obliged" is capable of being misunderstood: as I think it was misunderstood by the county court judge. The peril which a workman encounters in the course of doing his work by doing it negligently is not a peril which he is obliged to encounter; in fact by his contract of service he is obliged not to encounter it; for it is an implied term that he should work with reasonable care. There are many things done which the workman is not obliged to do, for he is given a complete discretion as to what to do and where (within limits) to do it, as for instance, in the case of gamekeepers, and often gardeners. Accidents happen to workmen when taking their meals or in other respects not pursuing for the moment their employment. The Lord Chancellor is in any case only referring to perils which the workman is not obliged to encounter: but even so I think the word may be misunderstood, and the test must be—are the perils those which he in fact encounters while doing the work which he is employed or authorized to do. In the present case I am satisfied that the evidence leads to only one conclusion, that the appellant was injured by a peril of his employment while doing what he was employed or authorized to do—namely, drying his clothes. I think, therefore, that this appeal should be allowed, the order of the Court of Appeal and the award of the county court judge should be set aside and the case remitted to the county court judge to award compensation. The appellant should have the costs in the county court and in the Court of Appeal and the costs in this House appropriate to a successful appeal in forma pauperis.

(1) [1917] A. C. 352.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANU-
FACTURERS.

LORD THANKERTON. My Lords, I agree with the opinion of my noble and learned friend on the Woolsack. My noble and learned friend Lord Wright, in the opinion which he is about to deliver and which I have had the privilege of considering, has so fully and so exactly expressed my views in this case, that I will only add a few observations.

In my opinion, the learned county court judge in the present case is open to the criticisms expressed by Lord Buckmaster in *Thomas* v. *Ocean Coal Co.* (1), where he said: "The learned county court judge, whose award was upheld "by the Court of Appeal, has rightly proceeded along the "lines I have indicated, but it is his final investigation as to "whether the accident arose out of and in the course of the "employment that has caused me the gravest difficulty. "He has not held as a matter of fact that the accident did "not so arise, but he has reasoned himself to this conclusion "in the belief that he was so constrained by the authority of "*Stephen* v. *Cooper*. (2) The workman there had, without "putting the knives out of action, walked along the pole of a "mowing machine in order to adjust the harness of one of "the horses, which had become detached, and the horses, "starting, had thrown him under the knives which had caused "him serious injury. The arbitrator had found that the act "was not done in connection with the respondent's business, "but was an act of bravado, and that the injury was not due "to an accident arising out of and in the course of his "employment. The decision did no more than say that "there was evidence on which the arbitrator could so find; "but the doctrine of an 'added peril' was referred to by "Lord Hailsham, where he says: 'There was ample evidence "'to justify the arbitrator in finding that the principle of "'"added peril" applies to the present case, and that "'consequently there was evidence on which he could "'properly find that the injury was not due to an accident "'arising out of employment.' I agree with the Master of "the Rolls in thinking that such a phrase is not a touchstone "whereby to determine whether or not the man was acting

(1) [1933] A. C. 100, 108. (2) [1929] A. C. 570.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANU-
FACTURERS.

Lord Thankerton.

"within his employment, and it would, I think, be unfortunate "if this phrase got crystallized into a form of test, and an "accident should be looked at according to the meaning of "these words instead of relying, as reliance must be placed, "upon the words of the Act of Parliament." This passage is directly applicable to cases arising under s. 1, sub-s. 1, of the Act, and I agree with the observations of my noble and learned friend on the so-called doctrine of " added peril " and the use of the word " obliged " by Lord Hailsham in the passage in his opinion in *Stephen* v. *Cooper* (1), which I am inclined to think has misled both the arbitrator and the Court of Appeal in the present case.

My Lords, I feel bound to come to the opinion that I have formed, on consideration of the words of the Act of Parliament, for the reasons expressed by my noble and learned friend, and also by the decisions of this House referred to by him, and in particular the cases of *Barnes* v. *Nunnery Colliery Co.* (2) ; *Stephen* v. *Cooper* (1) ; and *Thomas* v. *Oceal Coal Co.* (3) The Courts below appear to me, with all respect, to proceed on a misunderstanding of Lord Hailsham's dictum in *Stephen* v. *Cooper* (1) and a misapplication of the so-called doctrine of " added peril." I cannot agree that the question is one of "fact and degree " of recklessness ; in my opinion there must be a separable act, as explained by my noble and learned friend. In my opinion, there was not evidence in the present case on which the arbitrator was entitled to find that there was such a separable act, and the appeal should succeed.

LORD RUSSELL OF KILLOWEN. My Lords, in my opinion we ought not to alter the decision of the Court of Appeal, which affirmed the arbitrator's award. As I view the case it is, upon his findings, covered by the decisions of this House upon what has been called in this House " the principle of the "added peril." All your Lordships, however, think otherwise, and in these circumstances my statement of the reasons for my opinion will be brief.

(1) [1929] A. C. 570.
(2) [1912] A. C. 44.
(3) [1933] A. C. 100.

This is a case under s. 1, sub-s. 1, of the Act, and is in no way concerned with s. 1, sub-s. 2. *Thomas* v. *Ocean Coal Co.* (1). which dealt with the question whether the added peril principle could apply to a case which fell under s. 1, sub-s. 2, appears to me to have no relevance here. But in a case falling under s. 1, sub-s. 1, we are, I think, concluded by authority, and we are bound to hold that if the accident has been brought about by an act of the workman of a nature so perilous that no one could be employed to do such an act, then the workman cannot recover, because the accident cannot be said to have arisen out of and in the course of his employment. That, as I understand it, is the principle of the added peril in cases falling under s. 1, sub-s. 1, as expounded in the most recent decision of this House—namely, *Stephen* v. *Cooper* (2), and particularly in the speeches of Lord Hailsham and Lord Warrington. The workman is not deprived of relief because of negligence or misconduct, but because his act was of a nature so perilous as to be outside the scope of his employment.

Whether the act of the workman was of a nature to fulfil this requirement is essentially a question for the arbitrator; and in the present case as I read his judgment he has found that the act of the workman in putting his leggings " inside "the casing behind the iron brace of the turbine in close "proximity to the revolving fan " fulfilled the requirement. He describes it as " a peril which no workman without acting "with extreme rashness would have undertaken." The act being of a nature so perilous, he held upon the authority of *Stephen* v. *Cooper* (2) that the accident did not arise out of and in the course of the workman's employment.

The Court of Appeal held that the arbitrator was justified on the facts in so holding, and dismissed the appeal. It is suggested here that the grounds upon which the Court of Appeal proceeded were these: That whereas a workman who is guilty of slight negligence is nevertheless entitled to recover, a workman who is guilty of great negligence or gross negligence is not. To suggest that is, I think, to do a grave

(1) [1933] A. C. 100.

(2) [1929] A. C. 570.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANU-
FACTURERS.

Lord Russell
of Killowen.

injustice to the Court. As I read the judgment of the Master of the Rolls what he has said is this—that an act within the scope of the employment may still remain within that scope though done negligently; but that there may be an act of a nature so perilous that no sensible workman would ever do it. In other words that no workman could ever be employed to do it, and it is therefore an act outside the scope of the employment.

Romer L.J. spoke I think to the same effect. It is true that at first sight he seems to contrast an act done negligently with the same act done in some different manner. But his meaning is to me plain. He intends to contrast two different acts—namely, an act which is within the scope of the workman's employment though done negligently, and an act of so different a kind as to be (in his own words) "something "outside the scope of his employment."

Whether the undoubtedly perilous act of placing his leggings immediately under the revolving fan for the purpose of drying them was within or outside the scope of the workman's employment was a matter to be found by the arbitrator. If it was outside the scope of the employment, the award was right. The Court of Appeal refused to disturb the award, and in my opinion we ought to adopt the same course.

LORD MACMILLAN (read by LORD THANKERTON). My Lords, throughout the whole course of the legislation dealing with workmen's compensation from 1897 down to the present day the cardinal condition of a valid claim of compensation has been that the accident causing personal injury to the workman shall have arisen out of and in the course of his employment. Amending legislation has affected this cardinal condition in a not very logical fashion by providing that, if the accident results in death or serious permanent disablement then, in certain cases, notwithstanding that certain facts are proved which might be thought to establish that the accident did not arise out of and in the course of the employment, the employer is to be precluded from so maintaining by reason

Lord Macmillan.

of these facts alone. If the injury to the workman is proved to have been attributable to his serious and wilful misconduct compensation is not to be disallowed by reason of this fact if the injury results in death or serious and permanent disablement—which is tantamount to saying that although the accident is attributable to the workman's serious and wilful misconduct it may nevertheless be held to arise out of and in the course of his employment. In such a case, although the employer cannot in answer to the claim plead that the accident was due to the serious and wilful misconduct of the workman, he may still plead that for other reasons it did not arise out of and in the course of the employment. Further, but again only if the accident results in death or serious and permanent disablement, the employer is precluded from pleading that the accident did not arise out of and in the course of the employment because at the time of the accident the workman was (*a*) acting in contravention of a statutory or other regulation applicable to his employment or of orders given by or on behalf of his employer or (*b*) acting without instructions from his employer, provided in both cases that such act was done by the workman for the purposes of and in connection with his employer's trade or business. Subject to these qualifications and restrictions the plea that the accident did not arise out of and in the course of the employment remains available to the employer.

The accident suffered by the workman in the present case has resulted in his serious and permanent disablement, but the case does not fall within any of the categories above described for which special statutory provision is made; the accident has not been held to be attributable to the serious and wilful misconduct of the workman nor has the workman been found to have been doing something for the purposes of and in connection with his employer's trade or business but in contravention of some statutory or other regulation applicable to his employment or of his employer's orders or without his employer's instructions. In other words the case arises on s. 1, sub-s. 1, of the Act alone.

Now it is obvious that a workman during his working hours and when he ought to be doing what he is employed to do may choose to do something which has nothing to do with his employment and while so engaged may sustain injury by accident. In such a case the accident plainly does not arise out of and in the course of the employment. The workman has for the time being by his conduct put himself outside his employment. He is not working at his job; he is doing something else. It is in this light that the case of *Stephen* v. *Cooper* (1) should be read and understood. The workman there at the time of the accident was engaged not in doing his work but in a "foolhardy act of bravado."

But if an accident befalls a workman while he is doing something that he is employed to do he cannot be said to have quitted his employment merely by reason of the manner in which he has acted in doing what he was employed to do.

In the present case, as the learned arbitrator has found, the workman in drying his leggings was doing something which was in the course of his employment, for the operation of drying his leggings was incidental to his day's work. But the way in which he was attempting to dry his leggings has been characterized by the learned arbitrator as showing "extreme rashness," involving "a peril which no workman "without acting with extreme rashness would have under- "taken." He did an "extremely foolish thing" which there "was nothing in the contract which obliged him" to do. It is on these findings that the learned arbitrator conceived himself to be in law precluded from awarding compensation.

In so holding, the learned arbitrator in my opinion misdirected himself. The word "obliged" which he borrowed from the speech of Lord Hailsham L.C. in *Stephen* v. *Cooper* (1) is liable to be misunderstood. It does not in its context mean anything more than that the workman at the time of the accident must be engaged in doing something which is within the scope of his duty as an employee. The appellant in the present case was doing something which was within the scope of his duty—namely, drying his leggings,

(1) [1929] A. C. 570.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANUFACTURERS.
Lord Macmillan.

and the fact that he proceeded to do it in an extremely rash way does not prevent the accident which he sustained from arising out of his employment. The question is not one of degree but of kind, not of the degree of carelessness or rashness which the workman exhibits in doing his work but whether he is doing his work at all. But I need not pursue the topic in any further detail, for I have had the advantage of reading in print the opinion of my noble and learned friend Lord Wright, who is about to address the House, and I find myself in entire agreement with his views. In my opinion the appeal should be allowed.

LORD WRIGHT. My Lords, in this appeal, which raises a question of importance under the Workmen's Compensation Act, I agree with the opinions just delivered by my noble and learned friends Lord Atkin, Lord Thankerton, and Lord Macmillan. The facts found by the county court judge may be thus stated in meagre but sufficient outline.

There arose out of and in the course of the man's employment that he had to dry his leggings at a turbine in a motor room at the works. The turbine operated a revolving fan enclosed in an inner casing which had in it holes at intervals to allow the draught produced by the fan to come out. There was an outer casing open at the bottom. He found on the occasion in question that another workman had put his leggings at the edge of the outer casing, which was the more convenient place. What he then did was to put his leggings inside the outer casing. He was pushing the leggings inwards to counteract the draught when the revolving fan caught the clothes and pulled them inside the inner casing pulling with them his hand, which was cut off so that he was seriously and permanently disabled. The judge rejected his claim for compensation. He said that though the man was obliged to dry these leggings, and was entitled to dry them somewhere within the benefit of the draught of the turbine, there was nothing in the contract which obliged him to put his hand within the base of the turbine. He found that the act was outside the employment. He added that this was a peril which no workman without acting with extreme rashness would have undertaken. It was "an extremely foolish thing." He held that the law forbade him to award compensation. The Court of Appeal affirmed his judgment.

The case in my opinion raises in simple and direct form the question whether an act done in the course of the employment and prima facie arising out of it, is removed from the scope of s. 1 because it was done in an extremely negligent, reckless, rash or foolish way, so that it may be said that the workman by his manner of doing what he had to do had acted with extreme rashness. There was here only one act in question—namely, the drying of the leggings within the benefit of the draught of the turbine. The judge does not find that the man deliberately put his hand inside the inner casing and within reach of the fan. His hand got in by accident; "unfortunately," in the judge's words, "his hand was caught." The man's evidence as it appears in the judge's note is: "put my hand in too far, draught caught sack legging and "before I realized it caught my right hand as well."

On the facts found by the judge as I read them, this was a case in which an act arising out of and in the course of his employment was done so recklessly and rashly that the injury might properly be held to have been attributable to that recklessness or rashness. But such a finding would at the most, in my judgment, fall within s. 1, sub-s. 1 (*b*), of the Act, even if the rashness is to be put as high as serious and wilful misconduct. It was not said that the man was doing a prohibited act, indeed if that had been so it would at once have brought the case within s. 1, sub-s. 2, of the Act of 1925, which neither side relied on. I do not find it possible to dissect the act done into two parts, one part within the employment and one part not within it, or to say that the man was acting within his employment, till a point came when (I suppose) he pushed the leggings in too far and his hand got caught. In my opinion, if the accident is to be held to be outside s. 1, it must be because it is found that what the man did was in its inherent nature of a different kind from anything that he was employed to do. But what the judge finds is that the man was doing something which arose out of and in the course of his employment, though he was doing it "with extreme rashness." The judge has not found, indeed there was no evidence on which he could have found, that in fact the act done was outside the employment. He arrived at his conclusion as a matter of law. It is true that when the facts are found the question whether the case falls within s. 1, sub-s. 1, of the Act is a matter of law. But here, in my opinion, on the facts found by the judge, it followed as a matter of law on the true construction of s. 1, sub-s. 1, of the Act that the man was entitled to recover.

The conclusion which the judge arrived at seems to have been due to a failure to appreciate the effect of *Stephen* v. *Cooper* (1), on which he expressly based his judgment. In that case the act which caused the injury was held by the arbitrator to be outside the man's employment, because of the view he formed of its character. According to his finding, it was not merely rash or reckless, as indeed it was. It was an act of a kind different from any act that the man was employed to do. He was a farm labourer, working a mechanical cutter and reaper. Attached to the machine was a long pole, on each side of which were the two horses which drew the machine, and which were harnessed to it in the usual way. The traces of one horse became detached. The man, instead of jumping off and running to the horse's head, ran along the slanting pole and fell off as the horses started forward; he was seriously injured by the revolving cutters. Lord Hailsham described this action as an act of bravado. Indeed, it was rather the act of an acrobat than of a farm labourer. There was no need to dissect it into two parts, and say one part was within and one part outside the employment. It was a single act and the arbitrator was entitled to find that as such it was outside the employment. It was in respect of this finding of facts, which, though another view might have been taken, was final, that Lord Hailsham used the language quoted in the Court of Appeal in the present case: "Apart from the question of

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(1) [1929] A. C. 570.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED
PORTLAND
CEMENT
MANUFACTURERS.
Lord Wright.

"serious misconduct, if the accident arises from some peril "to which the workman has exposed himself by his own "conduct and which he was not obliged to encounter by any "term of his contract of service, the accident cannot be said "to arise out of his employment." These words were apt and appropriate to the facts of the case as found by the arbitrator, but cannot properly be applied apart from their context or used as a general statement of law of the same binding force as if written into the statute. I am reluctant to repeat the warning so often reiterated in this House of the danger of superseding the words of the Legislature by language used by judges in particular cases and with reference to the facts of the particular cases in order to explain how they arrived at the particular decisions. But I must at least give a reference to the words of Lord Dunedin in *Plumb* v. *Cobden Flour Mills Co.* (1), later quoted by Lord Buckmaster in *Thomas* v. *Ocean Coal Co.* (2) In particular Lord Dunedin there pointed out that most of the erroneous arguments put before the Courts in this branch of the law will be found to depend on disregarding the salutary rule that a test convenient in a particular case must not be allowed to dislodge the original words of the Act. I venture to add that the tendency to disregard the words of the Act and substitute extracts from judgments is largely responsible for the accretion of thousands of cases round a legislative measure which was intended to be administered rather than litigated upon. In *Stephen's* case (3) the man was not obliged by his contract of service to assume the rôle of an acrobat, and in doing so he exposed himself to a peril arising from his own conduct. Hence the aptness in that case of Lord Hailsham's language. Lord Warrington thus states the position (4): "In my opinion, "it was quite open to the arbitrator on the evidence to find "that what the appellant did was not merely an improper "way of doing what he was employed to do—namely, replacing "the chain—but was the doing of a thing—namely, the walking "along the pole—which, whatever the object with which it

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(1) [1914] A. C. 62, 65.
(2) [1933] A. C. 100, 109.
(3) [1929] A. C. 570.
(4) Ibid. 582.

"was done, was a thing he was not employed to do and was "not in the contemplation of either party to the contract." The distinction so drawn is, I think, vital in principle to the decision whether a case does or does not come within s. 1 of the Act. Lord Warrington does not use the word "obliged" nor is that word used in s. 1 of the Act. The term may be helpful in some cases when the Court is inquiring whether the thing done is different in kind from anything the man is employed to do. But the term is not appropriate when the question has to do with acts which involve serious or wilful misconduct or even negligence, but are otherwise such as the man has to do. It can only be appropriate when considering what is the intrinsic character of the acts so as to determine if they fall outside the employment. If a man does what he is employed to do, he may perhaps be said to do what he is "obliged" by his employment to do, and if that is true in any such case it does not become less true merely because he does it in a manner which is negligent or improper even to the extent of serious and wilful misconduct. No one would say that a man's employment obliged him to be guilty of serious and wilful misconduct, though the action as a whole was one which fell within his employment and as such fell within s. 1, sub-s. 1.

"Obligation" on any view refers to the character of the act, not to the manner of doing it. But I should hesitate to treat the word as affording in any case real or general guidance. Lord Shaw in *Stephen's* case (1) seems to indicate his opinion that in certain events a zealous or well-meaning workman may exceed his strict duty without losing the protection of the Act. That may well be true. Emergencies also may raise questions. The word "obliged" finds no place in the Act and the Courts have no right to insert it.

The distinction to which I have been adverting is clearly drawn by this House in *Barnes* v. *Nunnery Colliery Co.* (2) Lord Atkinson says (3): "In these cases under the "Workmen's Compensation Act a distinction must, I think,

(1) [1929] A. C. 570, 579.
(2) [1912] A. C. 44.
(3) [1912] A. C. 49.

"always be drawn between the doing of a thing recklessly or "negligently which the workman is employed to do, and the "doing of a thing altogether outside and unconnected with "his employment." And Lord Loreburn (1) said: "But "if the thing he does imprudently or disobediently is different "in kind from anything he was required or expected to do "and also is put outside the range of his service by a genuine "prohibition, then I should say that the accidental injury "did not arise out of his employment." The problem may be compendiously stated in the words of Lord Macnaghten in *Reed* v. *Great Western Ry. Co.* (2) as being whether the man at the time when the accident happened was about his own business, not about the business of his employers. Again, in cases where there was an act of disobedience to regulations or orders, the question has been said to be whether the disobedience took the action outside the scope of the employment, or was only a piece of misconduct in the employment.

Plumb v. *Cobden Flour Mills Co.* (3) and *Lancashire and Yorkshire Ry. Co.* v. *Highley* (4), were cases in which the former view was taken and it was held that the accident did not arise out of the employment. In these and other cases the phrase "added peril" has been used, but as Lord Haldane pointed out, what that phrase means is a peril voluntarily superinduced on what arose out of the employment to which the workman was neither required nor had authority to submit himself: *Highley's* case (5); and Lord Dunedin in the same case (6) added "the question is always whether the case "falls within the words of the Act, and that 'added peril' "is a test only, though a very convenient test in certain "circumstances." Lord Buckmaster expresses himself to the same effect in *Thomas* v. *Ocean Coal Co.* (7) Indeed, that an "added peril" may not take a case out of the Act is clear from the words of s. 1, sub-s. 1 (*b*), which enables compensation to be given if the injury results in death or serious and permanent disablement where the injury is attributable to serious and wilful misconduct. To say that the injury is attributable to serious and wilful misconduct means that it would not have occurred but for serious and wilful misconduct so that the misconduct must have involved "an added peril." It seems to me that this phrase, which does not embody a principle, is very apt to mislead and distract the mind from the true question. That the question still remains the same since the amendment of the law now embodied in s. 1, sub-s. 2, of the Act is clear from *Kerr* v. *James Dunlop & Co., Ld.* (1), where the claim was rejected because the man had left the sphere of his own employment and entered the sphere of another man, skilled, responsible and specially authorized, with which as an unskilled man he had no right to meddle. By way of contrast, reference may be made to *Wilsons & Clyde Coal Co., Ld.* v. *M'Ferrin* (1) and *Thomas* v. *Ocean Coal Co.* (2)

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(1) [1912] A. C. 47.
(2) [1909] A. C. 31.
(3) [1914] A. C. 62.
(4) [1917] A. C. 352.
(5) [1917] A. C. 361.
(6) Ibid. 365.
(7) [1933] A. C. 100, 109.

While the judge decided the case as a matter of law on the facts which he found, the Court of Appeal seem to treat the question as a question of fact and degree whether the act was one of mere ordinary negligence, or was so rash and foolish that no sensible workman would ever do it. Romer L.J. treated the judge's decision as being that it was not within the scope of the man's employment to dry his clothes in the way he did. With the greatest respect to the opinions of the Court of Appeal, I think that these expressions tend to obscure the real distinction between the manner of doing an act which in its nature is within the employment and the doing of an act which in its nature is different in kind from any contemplated by the employment. It is not easy to reconcile all the expressions which have been used in judgments on the question whether the application of s. 1, sub-s. 1, of the Act depends on fact or law. In one sense it is both fact and law. The facts have to be found and the words of the Act then applied to the facts according to their true construction which is matter of law. For reasons already

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(1) [1926] A. C. 377.

(2) [1933] A. C. 100.

H. L. (E.)
1938
HARRIS
v.
ASSOCIATED PORTLAND CEMENT MANUFACTURERS.
Lord Wright.

stated, I do not think that on the true construction of the section an act which in its nature is within the section ceases to be so because it is recklessly or improperly performed, or that mere degree of negligence or impropriety such as is found in this case changes the intrinsic character of the act and makes it different in kind.

In my opinion the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *H. Flint & Co., for Thomas H. Church, Gravesend.*

Solicitors for respondents: *Leonard & Pilditch.*

[HOUSE OF LORDS.]

H. L. (E.)* OWNERS OF S.S. HERANGER . . . . APPELLANTS;

1938 Nov. 15, 17, 18; Dec. 15.

AND

OWNERS OF S.S. DIAMOND . . . . RESPONDENTS.

[THE HERANGER.]

Shipping—Collision—Port of London River By-laws—Duty thereunder—Whether one vessel entitled to expect other vessel to comply with by-laws—Failure to reduce speed substantially earlier.

In an action arising out of a collision in the Thames between the *Diamond* and the *Heranger*, Bucknill J. and the Court of Appeal (Scott L.J. dissenting) held that the *Diamond* was the more seriously to blame, but that the *Heranger* was also to blame by failing to take effective action earlier by reducing her speed, and was liable in the proportion of one-third.

On appeal by the *Heranger*:—

Held, that the *Heranger* left it too late to reverse her engines and thus reduce her speed, and was therefore in part liable for the collision.

Per Lord Wright: The question whether a vessel is justified in maintaining her speed and relying on another vessel taking action to avoid the possibility of collision is a question of fact and not of law. View to the contrary expressed by Hill J. in *The Haliartus* (1928) 31 Ll. L. Rep. 185, 189 dissented from.

Per Lord Wright: Whatever the Admiralty law on the matter was before the Maritime Conventions Act, 1911, it is now clear that the onus is on the party setting up a case of negligence to prove both the breach of duty and the damage. This, the ordinary rule in common law cases, is equally the rule in Admiralty.

The Aeneas [1935] P. 128 overruled.

Decision of Court of Appeal affirmed.

APPEAL from the Court of Appeal.

The plaintiffs, the owners of the steamship *Diamond*, claimed damages in respect of a collision with the defendants' steamship *Heranger* which occurred in the Thames on December 20, 1936, which they alleged was due to the negligence of those on board the *Heranger*. The defendants alleged

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD PORTER.

H. L. (E.)
1938
S.S. HERANGER (OWNERS) v. S.S. DIAMOND (OWNERS).

that the collision was due to the negligence of those on board the *Diamond.*

The action was tried by Bucknill J., who held that the *Diamond* was to blame for her failure to comply with Rule 33 of the Port of London River By-laws, but that the *Heranger,* although placed in a difficulty by the action of the *Diamond,* was likewise to blame in failing to reduce her speed earlier than she did. He accordingly found both vessels to blame—the *Diamond* two-thirds, and the *Heranger* one-third.

On appeal by the *Heranger,* the Court of Appeal (Scott L.J. dissenting) affirmed the decision of Bucknill J.

The owners of the *Heranger* appealed to this House.

R. F. Hayward K.C. and *Gordon Willmer* for the appellants. Bucknill J. and the majority of the Court of Appeal were wrong in holding the *Heranger* to blame in part for the collision. It is said against us that our pilot ought to have given directions for the engines to be reversed substantially sooner than he did. We submit that is not so. We performed our duty under by-law 33; it remained for those in charge of the *Diamond* to do theirs; and that they failed to do. Until it was seen that the *Diamond* was not going to comply with her duty under by-law 33 the *Heranger* was under no obligation to take action, being entitled to assume that those on board the *Diamond* would act in accordance with the by-law. [They referred to *The Aeneas* (1), *The Haliartus.* (2)]

Kenneth Carpmael K.C. and *Owen L. Bateson* for the respondents were not called upon.

The House took time for consideration.

Dec. 15. LORD ATKIN. My Lords, I have had an opportunity in this case of reading the opinion which is about to be delivered by my noble and learned friend Lord Wright. I agree with it, and I will only add that as the result of the decision in this case, it is clear that the decision in the case of *The Aeneas* (3) must be taken to be overruled.

(1) [1935] P. 128, 131.
(2) (1928) 31 Ll. L. Rep. 185, 189.
(3) [1935] P. 128.

LORD THANKERTON. My Lords, I am of the same opinion.

LORD RUSSELL OF KILLOWEN. My Lords, I also concur.

LORD WRIGHT. My Lords, the appellants have been held by Bucknill J. and the Court of Appeal (Scott L.J. dissenting) liable in the proportion of one-third for the damages resulting from a collision between their vessel the *Heranger* and the respondents' vessel the *Diamond*, who have been held liable for two-thirds of the damage. They are appealing in order to secure a judgment that the *Diamond* was solely to blame.

The collision took place at about 6.12 P.M. on December 30, 1936, in the River Thames nearly opposite Stone Ness Point. The night was dark but fine and clear; there was a slight southerly breeze, the tide was ebb, and of about 2 knots in force. The *Heranger* is a twin screw motor vessel of 4877 tons gross register and 398 feet long. She was bound down the river from Victoria Dock to Antwerp, partly laden, and in charge of a Trinity House pilot named Dean. The *Diamond* is a small steamship of 628 tons gross register and 170 feet long. She was in ballast and was drawing 3 feet 6 inches forward and 11 feet 3 inches aft. She was at the time proceeding to the Kent Portland Cement Company's wharf, which is on the south side of the river west of Greenhithe from the Bell wharf, which is also on the south side of the river and is in St. Clement's Reach. The collision took place about opposite Johnson's wharf, which is between Greenhithe and the Kent Company's wharf, at a point in the stream about 500 feet from the south shore and just on the edge of the dredged channel. The river at that point is about half a mile wide. Unfortunately the master and one of the men were drowned. Thus the master, who had been both steering and navigating the *Diamond*, could not give his side of the story. The facts, however, have been very clearly found by the learned judge, whose findings have been accepted by both parties. Indeed there was practically no dispute about what happened, except as to the whistle signals given respectively by the two vessels. The displacement of the *Heranger* is calculated at 10,000 tons and of the *Diamond* at 800 tons.

The *Heranger* was about abreast of Stone Court wharf when she first sighted the *Diamond*. The *Diamond* was then coming up St. Clement's Reach. The judge found she was sighted at 6.6 P.M. She was showing her green light and a single masthead light; she was distant about one mile and was 2½ points on the port bow of the *Heranger*. The pilot of that vessel expected the *Diamond* to open her red when she began to round Stone Ness, so as to comply with Rule 33 of the Thames By-laws, which requires vessels proceeding up and down the river to pass port to port. But the *Diamond* continued to show her green in about the same or a finer bearing on the port bow of the *Heranger*. The *Heranger* was then proceeding with the tide at about 11 knots, the engines having been put full speed ahead at 6.6 P.M. This speed was not excessive. The *Diamond* is said to have had a speed of 6 knots through the water or about 4 knots over the land. The vessels were thus approaching each other at not less than 1000 feet a minute. It appears from her engine log that the engines of the *Heranger* were stopped at 6.10 according to the pilot's order. The pilot explained in evidence that he gave this order because he thought there was danger of collision. The vessels were then about four cables apart. The *Diamond* had not altered her course or opened her red on rounding Stone Ness as the pilot, thinking the *Diamond* was bound up river in the ordinary course, had expected her to do. A minute later at 6.11, the engines of the *Heranger* were put full astern. The distance between the vessels was then about two cables, or 1200 feet, stopping the engines having in the minute produced no appreciable effect on the *Heranger's* speed. The judge has precisely found the time when the engines were reversed and the relative positions of the two vessels at that time. He took the time, 6.11 P.M., from the engine log. He fixed the position of the *Diamond* on the independent evidence of a tug master, who passed the *Diamond* just before she signalled and placed her about 100 feet off Stone Ness Point and a little to the southward of mid-channel. He found that the *Heranger* was heading straight down Long

Reach with wheel amidships which would tend to take her nearer to the south bank. He found, after conflicting evidence, that the *Diamond* was first to sound a signal, and that the signal was two short blasts. The *Heranger* sounded a signal of three short blasts in reply.

What had happened was that the *Diamond* had gone full ahead and hard aport, in order to make the Kent wharf, at a time when, as the judge found, she must have been on a course which was at an angle of only 2 or 3 points from the opposite course of the *Heranger*. The inevitable collision occurred about one minute later, about opposite Johnson's wharf and about 500 feet from the shore. The *Diamond* was struck forward at an angle leading about 5 points aft just abaft the collision bulkhead. She sank immediately. The *Heranger* anchored.

It is not in question that the *Diamond* was the more seriously to blame of the two vessels. If she was to be deemed to be proceeding up the river she broke by-law 33, because she ported, when she ought to have starboarded in order to pass the *Heranger* port to port. She gave no port wheel signal till the vessels were about 1200 feet apart. If she was to be regarded as crossing from one side of the river to the other, she broke by-law 34, because she was not navigated so as not to cause obstruction, injury or damage to any other vessel. But apart from any particular by-laws, her action in porting when she did and putting herself in the way of the *Heranger* was so ill-advised, and such a breach of good seamanship, as almost to deserve the epithet suicidal which has been applied to it. The respondents have not contended that the *Diamond* was not to blame.

The question in the appeal is whether the judge was right in finding that the *Heranger* was also to blame, and holding the appellants liable in the proportion of one-third.

Certain minor grounds of complaint put forward by the respondents against the *Heranger* may be rejected as the judge and the Court of Appeal have done. These complaints are that her speed was excessive, that she was keeping too close to the south bank, that she was taking too wide a sweep when rounding the bend, and that she should have sounded a starboard wheel signal. I do not think it necessary to discuss these matters further. There remains the question which the judge said had perplexed him, and which is certainly difficult, whether the *Heranger* should have taken action earlier to reduce her speed, that is, whether she left it too late to reverse her engines? She did indeed stop at four cables, but merely to stop her engines would produce no appreciable effect up to the time when the engines were reversed, whereas reversing reduced her speed in the minute which elapsed before the collision from about 11 to about 4 or 5 knots. Ought the pilot of the *Heranger* to have reversed her engines at a time substantially sooner than he did, say, at the time when he stopped his engines, which was when the vessels were at about four cables distance, at least substantially before the distance had narrowed to two cables when he did reverse? The judge has found that the pilot ought to have done so. The Elder Brethren who were with him advised him to the same effect. It is clear that the judge came to his conclusion on a survey of all the circumstances. He pointed out that the *Heranger* took no effective action to reduce her speed until the vessels were about 1200 feet apart, because he disregarded the stopping of the engines as not capable of producing any material effect in the minute between stopping and reversing. When the *Heranger* reversed, she was closing on the *Diamond* at a rate of at least 1000 feet a minute, quite apart from the *Diamond's* speed of approach. If the *Diamond* had starboarded, she would have been retarded in doing so by the tide on her starboard bow. The precise bearing of the *Diamond* was difficult to ascertain, because she had only one masthead light. She had been angling to the south side of the channel for some minutes in full view of the *Heranger* and had shown no intention to starboard. She was gradually getting finer on the port bow of the *Heranger*, although the latter was gradually drawing closer to the southern edge of the channel, and could not herself go to starboard to any extent. These considerations taken together, which are fully justified by the evidence, warrant the conclusion that there was risk of collision even at four cables. This view was confirmed by the evidence of the pilot of the *Heranger*. He had been watching the *Diamond* for some time, since he had sighted her about a mile away, expecting her all the time to open her red. He did not think she was going to the south shore. When the ships were about four cables away, he did think there was danger of collision and then he stopped the engines. It is clear that what impressed him was the delay of the *Diamond* in straightening up. He did not know what she was going to do. At this stage the *Diamond* had not ported nor had she signalled. The question depends on whether the continuance of the *Diamond* on her wrong course reached a point at which the *Heranger* was bound to take effective action and had reached this point before she actually reversed. I agree with the judge and the Court of Appeal that it had. In my opinion that breach of duty contributed to the collision, or at least to the extent of damage consequent on it.

The question in this case depends on the rules of good seamanship, or what a prudent seaman ought to do, not on the breach of any specific Rule or Regulation. The Nautical Assessors who have been advising your Lordships agree that it would have been good and prudent seamanship for the *Heranger* to reverse at a time substantially before she actually did. The question is one of fact to be decided on a consideration of all the relevant circumstances. This, I think, is the footing on which the judge and the majority of the Court of Appeal have proceeded. In argument, however, the matter has been complicated by reference to what Scott L.J. in his dissenting judgment called "a rule "of law in the sense that it is a statement of what is the "meaning of the rules." It is said that the rule has been laid down in several cases, and in particular the words of Hill J. in *The Wheatear* (1) are quoted as a statement of the rule. Hill J. said that "it would lead to great confusion if at an "early stage ships which are navigating in a narrow channel

(1) (1920) 3 Ll. L. Rep. 229, 231.

"were under this obligation, that because one is not immedi-"ately seen to be acting properly, the other must be called "on to take drastic action. I think that each is for a time "entitled to assume that the other will act correctly and to "go upon that assumption, and it is only at the last when "it is quite clear that the other is not going to act correctly "that the one which has hitherto been doing what is right, "is called upon to do something more—that is, to take "immediate action to avoid the collision which the other is "bringing about, namely, by reversing engines." The same distinguished Admiralty judge in *The Haliartus* (1) in a similar connection described the question to be determined as a question of law and said it was whether the vessel was in the circumstances justified in maintaining speed relying on the expectation that the other vessel would correct her mistake, or should reverse and thus incur the risk of defeating that vessel's repentance.

I do not think that a question of this character can properly be treated as a question of law. The Court of Appeal recently held in *Tidy* v. *Battman* (2), a common law action for negligence in a motor-car collision, that it was not proper to set aside the finding of a jury by reference to a rule of conduct which it was said was a rule generally binding and a rule of law. I may venture to quote what I said in that case in the Court of Appeal (3): "It is unfortunate that questions which are "questions of fact alone should be confused by importing "into them as principles of law a course of reasoning which "has no doubt properly been applied in deciding other cases "on other sets of facts." In all these cases of negligence, whether on sea or on land, the decision must be arrived at as a question of fact on all the circumstances of each case. Cases and precedents may perhaps help sometimes, but they are in truth a very doubtful guide at best in deciding any particular case. Indeed I think this is obvious from the actual language of Hill J. in *The Wheatear* (4) where he speaks of "an early stage," "each is for a time entitled to assume,"

(1) (1928) 31 Ll. L. Rep. 185, 189.
(2) [1934] 1 K. B. 319.
(3) [1934] 1 K. B. 322.
(4) 3 Ll. L. Rep. 229.

"one is not immediately seen to be acting properly." These are, I think, questions of fact. But the sting of the passage is in the words, " when it is quite clear that the other "is not going to act correctly." If this were put as a question of law, I should not accept it as correct. Bucknill J. does not, I think, accept it. He begins by using the phrase " when "it should have become clear to the pilot of the *Heranger* "that the *Diamond* was not going to take appropriate action "to pass port to port." In the next sentence he put the matter thus: " When . . . . the *Diamond*, not having "given any signal to indicate her intentions, has got so close "to the *Heranger* that it should appear doubtful to the pilot "of the *Heranger* whether the *Diamond* can get port to port "by her own action alone if the *Heranger* continued on at her "comparatively high speed." This puts a concrete question of fact based on the facts of the case, and is, as I read it, a way of stating the question whether there was such an apparent risk of collision if no steps were taken to change the situation that a prudent pilot would reverse. This is different in substance from Hill J.'s criterion, " it is only at the last "when it is quite clear that the other is not going to act "correctly." Hill J. is disposed to support his rule by reference to the analogy of Regulation 21 of the Sea Rules. But that is not a true analogy. It is vitiated by a fundamental distinction. Rule 21 is specific and imperative, the " keep on " ship is to keep her course and speed, subject to the qualification contained in the Note that if that vessel finds herself so close that collision cannot be avoided by the giving way vessel alone, she shall take such action as will best aid to avert collision, in addition to which Regulation 27 provides for a departure from the Rules in order to avoid immediate danger. But in the present case there are no Rules which apply to the particular facts. The decision what action should be taken depends and can only depend on the requirements of good seamanship and the application of the ordinary principles of the law of negligence. Whether or not there is a breach of duty depends on the special facts of the case. But even in regard to Regulation 21, the facts of the case must be considered in order to determine whether the Note to Regulation 21 or Regulation 27 applies so that a vessel is not merely justified but bound to depart from the Rule. Thus in *The Otranto* (1) Lord Buckmaster quotes with approval what was said by Lord Herschell in *The Tasmania* (2): "As soon "then as it was, or ought to a master of reasonable skill and "prudence to have been, obvious that to keep his course "would involve immediate danger, it was no longer the duty "of the master of the *Tasmania* to adhere to the 22nd [now "the 21st] Rule. He was not only justified in departing from "it, but bound to do so, and to exercise his best judgment to "avoid the danger which threatened." Lord Buckmaster adds (1): "The rule was designed to secure that the stand-on "vessel shall maintain her course until the last safe moment." It is not necessary further to discuss the cases under Rule 21 because the Rule is no true analogy. But in any event even the Rule would not give so rigid a criterion as Hill J. seems to suggest. The duty in a case like the present may be described as a duty to avoid risk of collision. The position may become so uncertain that "the last safe moment" has arrived.

In my opinion, Bucknill J. did not misdirect himself but stated the true question and answered it correctly in the circumstances of the case. This really meets the reasoning on which Scott L.J. dissented and was of opinion that the judge was wrong. It is true, as he emphasizes, that to reverse is a very drastic step, especially with a heavy vessel like the *Heranger*, borne on a tide and not far from the shore. Nor does any one doubt that it should not be lightly assumed that a wrongdoing ship might not correct her error in time, and that it is not desirable to prejudice her repentance so long as action can properly be deferred. But the time may come when the drastic action of reversing must be taken. It is not questioned by the appellants that the time had certainly come when the vessels were two cables apart. But I think, in agreement with the judge and the majority of the Court of Appeal, that the time had come substantially earlier and that the *Heranger* left it too late to reverse her engines.

(1) [1931] A. C. 194, 201.

(2) (1890) 15 App. Cas. 223, 226.

H. L. (E.)
1938
S.S. Heranger (Owners)
v.
S.S. Diamond (Owners).
Lord Wright.

Mr. Hayward has, however, contended that even if the *Heranger* was negligent, still that negligence is immaterial unless it is established by the respondents that it actually contributed to the collision. He contended that the statement of law contained in the judgment of the President in *The Aeneas* (1) was erroneous. The President said: " I think the "principle to be applied, when there is a breach of a rule which "is definitely asserted to have contributed to a collision, is "that it is for those who have been guilty of the breach of the "rule to exonerate themselves, and to show affirmatively that "their default did not contribute in any degree to the collision, "actively, or to the resulting damage." This in my opinion is contrary to the principle stated by Lord Finlay that " only "faults which contribute to the accident are to be taken into "account for this purpose. The existence of fault on the "part of one of the ships is no reason for apportionment "unless it in part caused the damage": *The Karamea.* (2) It is also contrary to the general principle of the law of negligence, according to which it is necessary for the plaintiff to show both breach of duty and consequent damage. Damage is, it is said, the gist of the action. This is too well established at common law to call for any citation of authority. But it is, as Lord Finlay points out, also the rule in Admiralty. Whatever the Admiralty law on this matter was before the Maritime Conventions Act, 1911, it is now, I think, clear that the onus is on the party setting up a case of negligence to prove both the breach of duty and the damage. This, the ordinary rule in common law cases, is equally the rule in Admiralty. The party alleging negligence or contributory negligence must establish both the relevant elements. I thus find myself with all respect unable to agree with the view as to the onus of proof stated by the learned President in *The Aeneas.* (1) But though the burden is on the respondents to prove that the fault of the *Heranger* contributed to the accident and resulting damage, I think it is clear that they have discharged this burden. It is, I think, clear that if the *Heranger* had reversed at a time substantially earlier than she did, either there would have been no collision (which is very doubtful) or at least (which is perhaps more probable) a different and much less serious collision. No doubt the disastrous effect of the collision on the *Diamond* was due to her desperately improper action in hard aporting when she did. Scott L.J. thinks that no prudent pilot could possibly have foreseen such an action, and hence the pilot of the *Heranger* should be held to be in no fault at all. It is impossible not to feel that the *Heranger's* pilot was confronted in the end by very extraordinary conduct on the part of the *Diamond*. But that is really irrelevant on the question of fault, though it is relevant in so far as it goes to proportion of damage. The judge has held the *Heranger* liable in the proportion of one-third. There is no appeal against that apportionment. Indeed, this is not one of the exceptional cases in which an appellate Court would be likely to consider altering the proportions found by the judge.

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(1) [1935] P. 128, 131.

(2) [1922] 1 A. C. 68, 71.

The result is that in my opinion the appeal should be dismissed with costs.

Lord Porter. My Lords, I concur.

Appeal dismissed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *William A. Crump & Son.*

[PRIVY COUNCIL.]

J. C.*
1938
Oct. 21.

GOKAL CHAND-JAGAN NATH (FIRM) . APPELLANTS;

AND

NAND RAM DAS-ATMA RAM (FIRM) . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT LAHORE.

India—Principal and Agent—Commercial transactions through agent—Debts due to principal from third party—Financial embarrassment of debtor—Credit given by agent—Duty of agent to make best bargain possible—Burden of proof.

The respondents, commission agents, executed a number of commercial transactions on behalf of the appellants, merchants, with third parties, which resulted in money being due to the appellants from the third parties on the balance of the transactions. The third parties having become financially embarrassed, however, the respondents, as agents, obtained payment in cash of part only of the indebtedness to the appellants, and, without the appellants' authority, gave credit in respect of the balance. On a claim by the appellants against the respondents to recover from them the outstanding balance due to the appellants from the third parties:—

Held, that, there being no question of an authority limited to receiving cash, the duty which the respondents, as agents, owed to the appellants, their principals, was to exercise due care, skill and judgment in getting in in cash what they could by making the best possible bargain in all the circumstances with the third parties. The burden of proving that the respondents had been negligent and had failed in that duty, and that the appellants had thereby suffered damage, was on the appellants, who had not discharged that burden, the evidence in fact establishing that the respondents had taken all reasonable steps to realize as much in cash as possible. The respondents did not become guarantors of the debts on the debtors' insolvency.

Principle in *Russell* v. *Palmer* (1767) 2 Wils. 325, applied.

Decree of the High Court affirmed.

APPEAL (No. 133 of 1936) from a decree of the High Court (February 22, 1933) which, in effect, reversed a decree of the Senior Subordinate Judge at Sialkot (May 31, 1926).

The appellants, a firm of merchants in Sialkot, purchased and sold sugar and gunny bags at Calcutta on ready and

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* *Present:* LORD WRIGHT, LORD ROMER, LORD PORTER, SIR SHADI LAL, and SIR GEORGE RANKIN.

J. C.
1938
GOKAL CHAND-JAGAN NATH
v.
NAND RAM DAS-ATMA RAM.

forward transactions through the respondents, a firm of commission agents in Calcutta, for the period beginning December 3, 1919. The items in dispute related only to shipments of July, August and September, 1920, and arose out of transactions entered into by the respondents as commission agents for the appellants with the following three firms: (1.) Diwan Chand-Amar Chand; (2.) Chatter Bhuj Dossa; and (3.) Kalu Ram-Kanhaya Lal. In conducting the transactions the respondents did not disclose the name of the appellants' firm to the persons or firms with whom they dealt.

In July, August and September, 1920, the respondents, acting as the appellants' agents, entered into certain transactions with the three above mentioned firms for the purchase and sale of sugar, as a result of which the following sums became due and owing:—

From Diwan Chand-Amar Chand, Rs.1275; from Chatter Bhuj Dossa, Rs.8670; and from Kalu Ram-Kanhaya Lal Rs.510.

In October, 1920, in addition to the above sum of Rs.8670, Chatter Bhuj Dossa owed Rs.14,662–8–0 to the respondents as commission agents for another principal, making a total indebtedness of Rs.23,332–8–0. In October, learning that the financial position of Chatter Bhuj Dossa was unsound, the respondents recovered from him the sum of Rs.10,837–8–0, of which Rs.4012–12–3 was credited to the appellants and the remainder to the other principal. As regards the unpaid balance due and owing to the appellants the respondents, on December 11, 1920, took from Chatter Bhuj Dossa hundis in their own favour to the amount of Rs.18,000. The only subsequent payment made by Chatter Bhuj Dossa was of Rs.764–15–3 on March 26, 1921, and thereafter fresh hundis for Rs.12,500 were taken from him in October, 1921. On neither occasion were the appellants consulted before the hundis were taken, nor had the respondents any authority from the appellants to accept hundis. Chatter Bhuj Dossa was declared insolvent on May 8, 1922, and no further amount was ever recovered from him or from his estate by the respondents on behalf of the appellants.

The course of business in regard to the other two firms, Diwan Chand-Amar Chand and Kalu Ram-Kanhaya Lal, was conducted in the same manner, but in both those cases the debts for the balance due became ultimately time-barred.

On May 29, 1923, the appellants filed the suit out of which this appeal arose in the Civil Court of Sialkot District, claiming rendition of account. The appellants alleged in their plaint that there was still a large sum of money due to the appellants from the respondents as commission agents, but that, without rendition of account, they could not fix any particular amount as due.

The respondents pleaded (inter alia) that they had not been able to realize the balances claimed by the appellants owing to the financial condition of the firms from whom they were due. The respondents admitted that a sum of Rs.5450 was outstanding on the settlement of accounts between the parties and was still owed by them to the appellants, and said that they had always been ready to pay that sum to the appellants.

The Subordinate Judge held that the respondents were liable to pay to the appellants the sums not recovered from the third parties. With regard to the debt due from Chatter Bhuj Dossa he said: "long credit was given by defendants to "a customer with shaky credit; in such circumstances if loss "accrues to the principal by the insolvency of the debtor the "agent is clearly liable."

An appeal by the defendants to the High Court (Harrison and Agha Haider JJ.) was allowed. They held that "it has not "been shown that there was any negligence on the part of "the defendant in the action he took on behalf of his client, "and he is not liable for the losses incurred by the failure of "the firm of Chatter Bhuj Dossa, and for the impossibility "of recovering more than had been recovered from the other "two defaulting firms."

1938. July 12, 14. *C. S. Rewcastle K.C.* and *Dingle Foot* for the appellants. It was the duty of the agents to communicate to the principals the fact that the third-party debtors had failed to pay in cash, and to leave it to the principals to decide

J. C.
1938
Gokal Chand-Jagan Nath
v.
Nand Ram Das-Atma Ram.

whether any settlement ought to be arrived at in any other form than cash, or whether the agents should give credit to the debtors. In the absence of such instructions the agents had no implied authority to give credit, or to act as they thought fit and proper in the circumstances. In their transactions with the third parties the respondents failed to exercise that degree of diligence, care and skill which a principal is entitled to expect from a commission agent, and their failure to realize the debts due from the third parties was due to such failure. The agents were liable for the loss sustained by the principals owing to the insolvency of the debtor to whom the agents had given long credit. [Reference was made to Halsbury's Laws of England, vol. i., pp. 218, 246; *Wiltshire* v. *Sims* (1); *Williams* v. *Evans* (2); *Blumberg* v. *Life Interests & Reversionary Securities Corporation* (3); *Russell* v. *Palmer* (4); *Pape* v. *Westacott* (5); and Pollock & Mulla's Indian Contract and Specific Relief Acts, 6th ed., p. 565.] An agent is liable to his principal for interest on moneys wrongfully detained for the period of detention; Pollock & Mulla's Indian Contract and Specific Relief Acts, 6th ed., p. 429. The judgment of the High Court is invalid on the ground that it did not comply with the provisions of Order XLI., r. 31, of the Code of Civil Procedure.

S. P. Khambatta, for the respondents, was only required to argue with regard to the liability of an agent in such circumstances as the present. On the facts of this case the respondents were only brokers, and not auctioneers or factors. As brokers they had an implied authority to sell on reasonable credit and without notice to the principals. The contention of the appellants, if applied to the facts of this case, would make the respondents guarantors of the debts on the debtors' insolvency; such a contention cannot be supported. [Reference was made to *Thomas Gabriel & Sons* v. *Churchill & Sim.* (6)] The respondents can only be made responsible for the debts to the extent that it can be established that they were negligent in not realizing all they could, and that loss resulted to the

(1) (1808) 1 Camp. 258.
(2) (1866) L. R. 1 Q. B. 352.
(3) [1897] 1 Ch. 171.
(4) 2 Wils. 325.
(5) [1894] 1 Q. B. 272.
(6) [1914] 3 K. B. 1272.

J. C.
1938

Gokal Chand-Jagan Nath v. Nand Ram Das-Atma Ram.

appellants from such negligence: *Overend & Gurney Co.* v. *Gibb.* (1) On the facts as found by the trial judge it was established that the respondents had done all that was reasonably possible in making the best bargain they could under the circumstances.

Oct. 21. The judgment of their Lordships was delivered by Lord Wright. The appellants are a firm of merchants carrying on business at Sialkot. The respondents are a firm of commission agents in Calcutta, who, from between 1919 and 1922, were employed by the appellants to conduct transactions for the purchase and sale of sugar and the purchase of gunny bags. The question in this appeal relates to three transactions executed by the respondents on behalf of the appellants in accordance with this course of business. These transactions were duly closed by the respondents with the other parties, and in the result three sums of money were respectively due on the balance of the transactions, from Diwan Chand-Amar Chand Rs.1275, from Chatter Bhuj Dossa Rs.8670, from Kalu Ram Kanhaya Lal Rs.510. This was the position when the transactions were closed in October, 1920. But the three parties were in financial difficulties, and in the result the respondents succeeded in obtaining payment of a part only of this indebtedness. This action was brought to recover from the respondents the differences between the sums received from the third parties and the sums of indebtedness set out above. The largest debtor was the firm of Chatter Bhuj Dossa, from whom in the result when the firm became insolvent in May, 1922, there was still a considerable sum outstanding. The respondents had taken hundis on account in March, 1921, and renewals in October, 1921, but no cash payment had been obtained save Rs.764–15–3. The hundis which were taken were in the respondents' favour, and included sums other than those due in respect of the transactions conducted for the appellants. The respondents as commission agents had, in the ordinary course, in each case conducted the transactions in their own name, and taken a settlement from the third party for the whole balance of the account between them and that party, themselves apportioning that total sum between their different constituents, including the appellants. The appellants, for whom they had acted on that account, were not consulted before the hundis were taken, nor did they give any express authority to the respondents to accept hundis. The claim in the action was to recover the outstanding balance due to the appellants from the third parties, after giving credit in reduction for money actually recovered and paid over to the appellants by the respondents. The course of business in regard to the other two firms was the same, save that in their cases the debts for the balance became ultimately time-barred.

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(1) (1872) L. R. 5 H. L. 480, 484, 494–5.

The Subordinate Judge held that the respondents were liable to pay to the appellants the sums not recovered from the third parties, on the ground that the respondents, as agents, in giving credit to the third parties instead of recovering money from them did so at their risk, especially if the third parties' financial position was shaky, and were therefore answerable to the appellants as their principals for the amounts of the debts ultimately not recovered. In other words, he held that the agent was liable for the loss accruing to the principal by the insolvency of the debtor to whom he had given long credit. He also dealt with questions of interest and other matters of account. From this judgment appeal was taken to the High Court. That Court reversed the judgment of the Subordinate Judge, apart from questions of interest, to which reference will be made later.

The High Court were unable to accept the statement of principle on which the Subordinate Judge proceeded, which has been quoted above. In their opinion, the true principle was that the duty which the respondents, as agents, owed to the appellants their principals was to exercise due care, skill and judgment in getting in what they could by making the best bargain possible in the circumstances. The Court held that in the present case it was for the appellants, as plaintiffs, to prove that the respondents, as defendants, had failed in that duty, and had been guilty of negligence, and that they had

J. C.
1938
Gokal Chand-Jagan Nath
v.
Nand Ram Das-Atma Ram.

failed to do so. The Court held, on the contrary, that on the evidence it was established that the respondents did all that was reasonably possible, and that it was no fault of theirs that the realizations were not larger than they were. They accordingly varied the judgment of the Subordinate Judge by reducing the decretal amount to Rs.5919–8–3, which represented the money actually collected by the respondents in respect of the three debtors, together with interest from the date of the institution of the suit until payment at 6 per cent. per annum.

Their Lordships are in agreement with the High Court as to the principles to be applied. They have also considered the evidence in the case, and are of opinion that the conclusions of fact arrived at by the High Court are fully justified. On the question of principle, their judgment is that the case in question depends on determining what is the duty of an agent in a case where the third party, debtor to the principal, is financially embarrassed. His duty then, in their judgment, is to do his best to collect all he can in the circumstances. It may be that it is more prudent not to press the debtor into immediate bankruptcy, but to take what he can in cash at the moment, and to give time for the balance. This is what the respondents did in this case. They recovered a substantial amount of the indebtedness, and there is no evidence that they could have recovered more. The evidence is that they could not. The appellants' counsel have strenuously contended that the respondents are liable for the whole amounts eventually left outstanding on the ground that an agent is, in general, bound to receive cash in settlement of debts due to his principal, and has no right to give credit without express instructions from his principal, whereas in the present case the appellants gave no such instructions, and the respondents did not even ask for instructions until a later date, after they had accepted the hundis. On this point it is retorted that the appellants took no notice of this request for instructions. But, apart from that, their Lordships are of opinion that the propositions relied on by the appellants are not applicable to a case like this. There are various authorities to the effect

J. C.
1938
GOKAL CHAND-JAGAN NATH
v.
NAND RAM DAS-ATMA RAM.

that an agent's authority is, at least presumptively, to settle in cash, in the absence of express authority to the contrary effect or of an authority by custom or usage. Thus in *Blumberg* v. *Life Interests & Reversionary Securities Corporation* (1) the question was whether a valid tender of mortgage money had been made; it was held that it had not because it had been made by cheque, which was not a good tender. Again in *Williams* v. *Evans* (2) it was held that a purchaser at an auction sale could not claim that he had paid the purchase price as against the seller, when he had purported to do so by giving a bill of exchange to the auctioneer. That was no payment to discharge the purchaser as against the seller. Similarly, in *Pape* v. *Westacott* (3) an agent was held liable for parting with a licence against a cheque which was dishonoured, whereas he was only authorized to do so against cash. It is not necessary to multiply authorities on this point. But the position here is very different. This is a case where, the debtor being in financial difficulties, the agent gets all the cash he can and does his best to secure cash for the residue of the debt, thinking it best to give the debtor some time to pay. There is not here any question of an authority limited to receiving cash, nor is the agent giving up any valuable thing or right which he should not have given up save against cash. In fact, his duty is to do the best he can to get cash. The onus is on the plaintiff in such a case to prove that the agent has failed in that duty, and that the plaintiff has suffered damage, which he can only do by showing that the agent could have realized more cash in the circumstances of the case than he actually did. The onus is on the plaintiff to prove the breach of duty and the damage. An old case, *Russell* v. *Palmer* (4), illustrates that principle. The defendant was an attorney who, by his negligence, had failed duly to charge a judgment-debtor in execution, so that he was released from the prison in which he was held in respect of the debt. It was decided that the defendant was not liable for the whole debt, but only for such part of it as

(1) [1897] 1 Ch. 171.
(2) L. R. 1 Q. B. 352.
(3) [1894] 1 Q. B. 272.
(4) 2 Wils. 325.

J. C.
1938
GOKAL CHAND-JAGAN NATH
v.
NAND RAM DAS-ATMA RAM.

might have been realized by execution, because the action sounded only in damages. So, in the present case, the respondents did not become guarantors of the debts on the debtors' insolvency. They could only be made responsible for the debts to the extent that it could be established (*a*) that they were negligent in seeking to realize them, and (*b*) that loss resulted to the appellants from that negligence. Their Lordships agree with the High Court that the appellants have failed on both points.

A subsidiary question was raised about the interest claimable on the sums actually received. The High Court awarded interest from the institution of the suit, whereas the appellants have claimed that they are entitled to interest from the date of the demand, which was July 22, 1922, the date of the institution of the suit being May 9, 1923. The amount involved is trifling, and no question of principle is involved on the facts of this case, which, in their Lordships' judgment, do not take the case out of the ordinary common law rule recently discussed by this Board in *Bengal Nagpur Ry. Co., Ld.* v. *Ruttanji Ramji.* (1) Their Lordships will not repeat what was there said. In the present case no custom or contract to pay interest was proved, and further, no reason has been shown for treating the debt as a debt in equity to which equitable rules as to recovery of interest can apply. In any case, this question is not such as in the facts of the case to be a proper subject for invoking the appellate jurisdiction of this Board.

A further point was raised by the appellants. They urged that the judgment of the High Court appealed from was not a valid judgment because it failed to comply with Order XLI., r. 31, of the Code of Civil Procedure. The relevant facts on this issue are that the hearing in the High Court was before two judges, Harrison and Agha Haider JJ., and was actually delivered by the former judge, the latter agreeing. The judgment was delivered on February 22, 1933, but Harrison J. went on leave before signing the judgment, which was signed by Agha Haider J., the Deputy Registrar appending

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(1) (1937) L. R. 65 I. A. 66.

J. C.
1938
GOKAL CHAND-JAGAN NATH
v.
NAND RAM DAS-ATMA RAM.

a note that Harrison J. had gone on leave before signing the judgment he delivered.

Order XLI., r. 31, requires that the judgment of the Appellate Court shall be in writing, and shall state various matters, and "shall at the time that it is pronounced be "signed and dated by the Judge or by the Judges concurring "therein."

The rule does not say that, if its requirements are not complied with, the judgment shall be a nullity. So startling a result would need clear and precise words. Indeed, the rule does not even state any definite time in which it is to be fulfilled. The time is left to be defined by what is reasonable. The rule from its very nature is not intended to affect the rights of parties to a judgment. It is intended to secure certainty in the ascertainment of what the judgment was. It is a rule which judges are required to comply with for that object. No doubt in practice judges do so comply, as it is their duty to do. But accidents may happen. A judge may die after giving judgment but before he has had a reasonable opportunity to sign it. The Court must have inherent jurisdiction to supply such a defect. The case of a judge who has gone on leave before signing the judgment may call for more comment, but, even so, the convenience of the Court and the interest of litigants must prevail. The defect is merely an irregularity. But, in truth, the difficulty is disposed of by ss. 99 and 108 of the Civil Procedure Code. Sect. 99 provides that "no decree shall be reversed or sub-"stantially varied, nor shall any case be remanded, in appeal "on account of . . . . any error, defect or irregularity in "any proceedings in the suit, not affecting the merits of the "case or the jurisdiction of the Court." That section comes in the part dealing with appeals from original decrees. But s. 108 applies the same provision to appeals from appellate decrees, and it is always in the discretion of the Board to apply the principle on appeal to His Majesty in Council. In their Lordships' judgment, the defect here was an irregularity not affecting the merits of the case or the jurisdiction of the Court, and is no ground for setting aside the decree.

J. C.
1938
GOKAL CHAND-JAGAN NATH
v.
NAND RAM DAS-ATMA RAM.

Various cases on similar irregularities which have come before the Courts in India have been cited. Their Lordships do not find anything in these authorities to affect their decision here.

Their Lordships are of opinion that the appeal fails, and should be dismissed with costs.

They will humbly so advise His Majesty.

Solicitors for appellants : *Nehra & Co.*
Solicitors for respondents : *T. L. Wilson & Co.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ALBERTA . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . RESPONDENTS.

J. C.*
1938
July 14;
Nov. 4.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Alberta—Bill taxing Banks operating in Province—Object and effect of legislation—Not in true sense taxation to raise revenue for Provincial purposes—Part of legislative plan to prevent operation of banking institutions—Ultra vires—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (15.), (16.); *s.* 92 (2.)—*Bill entitled "An Act Respecting the Taxation of Banks," of the Alberta Legislature, third session,* 1937.

A Bill passed by the Legislative Assembly of the Province of Alberta at the 1937 Third Session, entitled "An Act respecting "the Taxation of Banks," and reserved by the Lieutenant-Governor of Alberta for the signification of the pleasure of the Governor-General in Council, imposed on every corporation or joint stock company, other than the Bank of Canada, incorporated for the purpose of doing banking or savings bank business in the Province, an annual tax, in addition to any tax payable under any other Act, of (*a*) ½ per cent. on the paid-up capital, and (*b*) 1 per cent. on the reserve fund and undivided profits, the tax to be payable to the Provincial Secretary on behalf of His Majesty for the use of the Province:—

Held, that on a comparison of the categories of subject-matters within the exclusive legislative competence of the Dominion and Provincial Legislatures respectively under ss. 91 and 92 of the British North America Act, 1867, and on a consideration of the object of the Taxation of Banks Bill and its effect if it became operative in the Province, the proposed taxation was not in any true sense taxation "in order to the raising of a revenue for "Provincial purposes" so as to be within the exclusive legislative competence of the Provincial Legislature under s. 92 (2.) of the British North America Act, but was merely part of a legislative plan to prevent the operation within the Province of those banking institutions which had been called into existence and given the necessary powers there to conduct their business by the only proper authority, the Parliament of the Dominion, under s. 91 of the British North America Act, and the Bill was therefore ultra vires the Provincial Legislature.

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* *Present:* LORD MAUGHAM L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD MACMILLAN.

Dictum in *Bank of Toronto* v. *Lambe* (1882) 12 App. Cas. 575, at p. 587, discussed and explained.

Judgment of the Supreme Court of Canada [1938] Can. S. C. R. 100, affirmed.

APPEAL (No. 48 of 1938), by special leave, from a judgment of the Supreme Court of Canada (March 4, 1938) declaring, on a reference to them by the Governor-General of Canada under s. 55 of the Supreme Court Act, R.S.C., 1927, c. 35, that the following three Bills passed by the Legislative Assembly of the Province of Alberta at its third session in 1937 were ultra vires of the Provincial Legislature: (1.) "An "Act respecting the Taxation of Banks"; (2.) "An Act to "Amend and Consolidate the Credit of Alberta Regulation "Act"; and (3.) "An Act to ensure the Publication of Accurate "News and Information." The Lieutenant-Governor of Alberta had withheld his assent to the three Bills and had reserved them on October 5, 1937, for the signification of the pleasure of the Governor-General in Council under ss. 90, 55 and 57 of the British North America Act, 1867.

The Supreme Court of Canada (Duff C.J., Cannon, Crocket, Davis, Kerwin and Hudson JJ.) were unanimous in their opinion. The judgments are reported at [1938] Can. S. C. R. 100.

During the hearing of this appeal by the Judicial Committee their Lordships, on July 7, 1938, held that inasmuch as the Social Credit Board and the Provincial Credit Commission, as constituted under the Alberta Social Credit Act, 1937, no longer existed, that Act having been repealed since the order of the Supreme Court on the reference in this case, those bodies could not perform the powers proposed to be conferred upon them in respect of the Press Bill and the Credit Regulation Bill, which Bills, therefore, could not now be brought into operation, and their Lordships, in accordance with the established practice of the Board in such circumstances, declined to hear arguments on this appeal so far as it related to those two Bills. The appeal accordingly proceeded in respect of the Taxation of Banks Bill alone. That Bill applied to every corporation or joint stock company, other than the

Bank of Canada, incorporated for the purpose of doing banking or savings Bank business and transacting such business in the Province. The Bill imposed on every such bank an annual tax, in addition to any tax payable under any other Act, of (*a*) ½ per cent. on the paid-up capital, and (*b*) 1 per cent. on the reserve fund and undivided profits. Penalties were provided for default in payment of the tax, and the tax was declared to be payable to the Provincial Secretary on behalf of His Majesty for the use of the Province.

The respondents to this appeal as originally brought were the Attorney-General for Canada; the Canadian Press and Newspapers Associations; the Alberta Press; and the Chartered Banks of Canada.

The main ground of appeal was that the Bank Taxation Bill would, if assented to, be intra vires the Albert Legislature as imposing direct taxation within the Province under s. 92 (2). of the British North America Act, 1867.

1938. July 5, 7. *O. M. Biggar K.C.*, *Cyril Radcliffe K.C.* and *J. J. Frawley K.C.* for the appellant. The three Bills which have been reserved are now awaiting the assent of the Governor-General. If he does not assent within a year, then they fall. The questions referred to the Supreme Court, while relating expressly to the Legislature of the Province of Alberta, might well have been expressed generally as relating the legislative powers of any of the other Provinces of Canada so far as the matters in question are concerned. [The terms of the three Bills were referred to.] All the Acts of the Province may be looked at to ascertain the scope and effect of the impugned Bills: the appellant's complaint about the judgments of the Supreme Court, however, is that they proceed on an assumption that the Alberta Social Credit Act, 1937, and certain other legislation, constituted part of a legislative scheme, and that, that legislation being bad, therefore the Bank Taxation Bill, being part of the scheme, is also bad: that is an improper inference. The following propositions are submitted: (*a*) In view of the decision in *Bank of Toronto* v. *Lambe* (1) the terms of the Bank Taxation

(1) (1887) 12 App. Cas. 575.

Bill are such that if the Bill is assented to it will be valid legislation. (*b*) Provincial legislation imposing a tax on banks cannot properly be held ultra vires because of the burden which it imposes—the weight of the tax is a matter for the consideration only of the Governor-General in Council, and not for that of the Court, with the possible exception that, if the legislation were proved to be such as to prevent banks from exercising their powers in the Provinces, it might be held to be incompetent, that is, if the tax was so heavy that nobody could carry on banking in the Province. (*c*) The circumstances in which a statute will operate are always relevant to a proper understanding of its terms, but when those terms are free from ambiguity or imprecision, the intention of the Legislature is to be gathered from them, and other material cannot be referred to for the purpose of attributing to them a meaning different from that which they clearly convey. (*d*) The competence of Provincial Legislatures to exercise the powers which the British North America Act, 1867, conferred on them can not vary from Province to Province or from time to time, and so can not be affected by past or contemporaneous events other than the exercise of overriding Dominion legislative powers. (*e*) A Provincial statute which would be valid standing alone, and is capable of independent operation, cannot be held invalid on the ground that a common intention underlies both it and an earlier invalid statute on a different subject. (*f*) In any event, no inference as to the existence of a common intention underlying two statutes which do not depend one upon the other may properly be drawn in the absence of either admission or of evidence, assuming that either admission or evidence can affect the situation. (*g*) On the question of the competence of a Provincial Legislature to enact the provisions of a reserved Bill, neither the course of conduct of the Legislative Assembly, nor the avowed policy of the Provincial Government, have any relevance, since the King or the Governor-General is equally with the Assembly an essential part of the Legislature.

On the question of practical prohibitiveness—the killing of the goose that lays the golden eggs—it is submitted that

J. C.
1938

ATTORNEY-GENERAL FOR ALBERTA *v.* ATTORNEY-GENERAL FOR CANADA.

the Bank Taxation Bill is not prohibitive at all; that, while it may be established that the tax is a heavy one, it is not one which would prevent bankers carrying on their business. It should not have been assumed to the contrary. The Bill is prima facie a valid one, and there must be something to set aside its validity. The intention must be taken from the words used. It is not proper to measure legislative competence by any considerations as to the policy or intentions of members of the Legislative Assembly or of that Assembly itself. When a Bill is reserved the Legislature has no mind or policy except what the words of the enactment express. [Reference was made to *Attorney-General for Ontario* v. *Reciprocal Insurers* (1); *In re The Insurance Act of Canada* (2); *MacBeth* v. *Ashley* (3); *Attorney-General for Alberta* v. *Attorney-General for Canada* (4); and *Attorney-General for Manitoba* v. *Attorney-General for Canada.* (5)]

The Press Bill [the provisions were referred to] has been said to be inoperative by the Supreme Court; it was also said to fall because it was part of the general legislative scheme of which the Alberta Social Credit Act was the basis; and it was also said to be bad as criminal law. There appears to be a difficulty in view of the fact that by the Alberta Social Credit Act, which has been repealed since the order of the Supreme Court in this case, there was created the Social Credit Board which was entrusted with important duties in connection with the operation of the Press Bill. It may have been intended to confer the powers to be exercised under the Press Bill on the chairman of a new board, but the Press Bill has not been amended to that effect, and the only board which need be considered is that constituted under s. 3 of the Alberta Social Credit Act, and that Act has been repealed.

[LORD MACMILLAN. It seems not so much a question of ultra vires as whether this is a piece of substantive legislation at all now before their Lordships. There can never be a chairman as constituted by s. 3 of the Alberta Social Credit

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(1) [1924] A. C. 328, 332, 342.
(2) [1932] A. C. 41, 51.
(3) (1874) L. R. 2 H. L. Sc. 352.
(4) [1928] A. C. 475, 487.
(5) [1929] A. C. 260, 268.

Act to exercise the functions referred to in the Press Bill.]

The position appears to be the same in regard to the Credit Regulation Bill, for the Bill requires credit institutions carrying on business in the Province to obtain licences from the Provincial Credit Commission, a body also created by the now repealed Alberta Social Credit Act.

Aimé Geoffrion K.C. for the Attorney-General for Canada, referred to *Brooks-Bidlake & Whittall, Ld.* v. *Attorney-General for British Columbia* (1), and *Attorney-General for British Columbia* v. *Attorney-General for Canada.* (2)

After a short adjournment to consider the matter, LORD MAUGHAM L.C. said: Their Lordships have carefully considered the interesting point of practice, and they feel bound to tell counsel that they think that it would be contrary to the practice and usual procedure adopted by the Privy Council that the Board should express any opinion to His Majesty on a subject which really is no longer a practical one in any sense at all, and for that reason I may say that I regret that they will not hear counsel upon it, and the appeal will proceed only in respect of the Bank Taxation Bill.

Cyril Radcliffe K.C. followed. It is quite impossible for a Court to say that the tax in question is not to be raised as revenue for Provincial purposes, and that it is not within the legislative competence of the Provincial Legislature under s. 92 (2.) of the British North America Act, 1867. The scope and effect of a legislative measure is to be ascertained by an examination of its actual provisions, and it is only when expressions used in it are ambiguous or imprecise that reference may be made to extraneous material. A statute expressed in unambiguous and precise terms cannot properly be held invalid on the grounds that another statute of the same Legislature is invalid and that a common intention underlies both. There is no ground afforded either by the provisions of the Bill or by other matter which may properly be referred to for treating the Bill as ancillary to or dependent

(1) [1923] A. C. 450.

(2) [1924] A. C. 203, 211–2.

upon the Alberta Social Credit Act or any general scheme of legislation.

[LORD THANKERTON referred to *In re The Regulation and Control of Aeronautics in Canada.* (1)]

Aimé Geoffrion K.C. and *J. Boyd McBride K.C.* for the Attorney-General for Canada. The Bank Taxation Bill is legislation in relation to banking, a subject-matter within the exclusive legislative competence of the Dominion Parliament. It is not " direct " taxation, or taxation " within the "Province " within the meaning of s. 92 (2.) of the British North America Act. The purpose and effect of the Bill may be looked at, and there is by it an extraordinary severe discrimination against the banks, and, moreover, a very big departure from the previous discriminating policy. Secondly, the amount of tax is so large that it indicates no intention to collect money, but an intention to exclude the banks. Thirdly, the logical policy of this legislation is to replace the ordinary Canadian banks by a Provincial State bank to operate its system of social credit. These cumulative effects demonstrate that the Bill is not in pith and substance taxation for Provincial purposes. In deciding whether the Bill is a good one conditions existing when it was passed may be looked at. The Bill and the Social Credit Act necessarily involved a combination against the banks. [Reference was made to *In re The Insurance Act of Canada* (2) ; *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (3) ; and *Union Colliery Company of British Columbia, Ld.* v. *Bryden.* (4)]

J. Boyd McBride K.C. followed. The judgments below all state that the legislation was part of one scheme of legislation. There is a series of statutes designed to wipe out banks ; another designed to establish credit houses. Having established that competitor, the next step was to make all those who were anxious to carry on business in the Province of Alberta deal with the particular credit system form of bank rather than with the banks authorized under Dominion legislation. Those are the three main points in this particular scheme. For that reason the Court below was justified in saying that there was a general scheme of legislation. That is not all. The next step was that nothing was to be allowed to be said in the Press which would be derogative to that particular scheme. It must be a scheme which nobody should be permitted to criticize—there was the muzzling of the Press. The last point in the general scheme is simply the wiping out of all bookkeeping debts and the starting of a new economic order. The legislation in question is part of a general scheme, and being ancillary, is ultra vires.

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(1) [1932] A. C. 54, 71.

(2) [1932] A. C. 41, 52–3.

(3) [1931] A. C. 310, 317.

(4) [1899] A. C. 580, 584.

W. N. Tilley K.C. and *B. V. McCrimmon* for the Chartered Banks of Canada. The tax is invalid because, among other reasons, taxing paid-up capital, reserve fund and undivided profits of banks transacting business throughout Canada and abroad carries the tax outside the Province. [Reference was made to *Bank of Toronto* v. *Lambe* (1), and *Brewers & Maltsters' Association of Ontario* v. *Attorney-General for Ontario.* (2)]

O. M. Biggar K.C. replied.

H. P. Duchemin K.C. for the Canadian Press and Newspapers Associations.

J. L. Ralston K.C. for the Alberta Press.

July 14. LORD MAUGHAM L.C. stated that their Lordships were of opinion that the appeal should be dismissed.

Nov. 4. The reasons of their Lordships for dismissing the appeal were delivered by LORD MAUGHAM L.C. This is an appeal by the Attorney-General for Alberta from a judgment of the Supreme Court of Canada (Duff C.J., Cannon, Crocket, Davis, Kerwin and Hudson JJ.), dated March 4, 1938, on a reference to them by the Governor-General of Canada under s. 55 of the Supreme Court Act (Revised Statutes of Canada, 1927, c. 35). The subject of the reference and of this appeal is the power of the Legislature of the Province of Alberta to enact three Bills which had been presented to the Lieutenant-Governor of Alberta for assent on October 5, 1937, and

(1) 12 App. Cas. 575, 582.

(2) [1897] A. C. 231, 237.

reserved by him for the signification of the Governor-General's pleasure.

By Order in Council, dated November 2, 1937, the Governor-General referred the following questions to the Supreme Court of Canada for hearing and consideration :—

"1. Is Bill No. 1, entitled 'An Act respecting the Taxation "'of Banks' or any of the provisions thereof and in what "particular or particulars or to what extent intra vires of the "Legislature of the Province of Alberta ?"

"2. Is Bill No. 8, entitled 'An Act to amend and Consoli-"'date the Credit of Alberta Regulation Act' or any of the "provisions thereof and in what particular or particulars or "to what extent intra vires of the Legislature of the Province "of Alberta ?"

"3. Is Bill No. 9, entitled 'An Act to ensure the Publication "'of Accurate News and Information' or any of the provisions "thereof and in what particular or particulars or to what extent "intra vires of the Legislature of the Province of Alberta ?"

By the judgment of the Supreme Court, dated March 4, 1938, the unanimous opinion of the Court on each of the three questions propounded was that it should be answered in the negative.

It is necessary to set out briefly the scope of the disputed Bills.

Bill No. 1, *entitled " An Act respecting the Taxation of Banks."*

This Bill applied to every corporation or joint stock company, other than the Bank of Canada, incorporated for the purpose of doing banking or savings bank business and transacting such business in the Province. The Bill imposed upon every such bank an annual tax, in addition to any tax payable under any other Act, of (*a*) ½ per cent. on the paid-up capital, and (*b*) 1 per cent. on the reserve fund and undivided profits. Default on payment of tax was to be visited with penalties, and payment of either tax or penalty could be enforced by distress and sale of goods and chattels, or by action for civil debt. The tax was declared to be payable to the Provincial Secretary on behalf of His Majesty for the use of the Province. It is important to note that the tax is calculated by reference to the whole of the paid-up capital and reserves made throughout Canada and abroad.

Bill No. 8, *entitled " An Act to Amend and Consolidate the " Credit of Alberta Regulation Act,* 1937."

This Bill applied to " credit institutions." that is, persons or corporations whose business was that of dealing in credit. Such business was defined in the Bill. The Bill required credit institutions carrying on business in the Province to take out licences from the Provincial Credit Commission constituted by s. 4 of the Alberta Social Credit Act. Applications for licences were to be accompanied by an undertaking, signed by the applicant, to refrain from acting, or assisting, or encouraging any person to act in a manner which restricts or interferes with the property and civil rights of any person in the Province. A breach of this undertaking might be visited by the Provincial Credit Commission with suspension or revocation of the licence, subject to a right of appeal to the Social Credit Board constituted by the above-mentioned Social Credit Act.

Before a licence was granted to a credit institution, one or more Local Directorates were to be appointed to supervise, direct and control the policy of the institution's dealing in credit for the purpose of preventing any act constituting a restriction or interference with full enjoyment of property and civil rights by any person within the Province. A Local Directorate was to consist of a majority appointed and removable by the Social Credit Board and a minority appointed and removable by the credit institution.

But it was expressly provided that no provisions of the Act should be so construed as to authorize the doing of any act or thing which is not within the legislative competence of the Provincial Legislature.

Bill No. 9, *entitled " An Act to ensure the Publication of " Accurate News and Information."*

This Bill applied to newspapers or periodicals published

J. C.
1938

ATTORNEY-GENERAL FOR ALBERTA v. ATTORNEY-GENERAL FOR CANADA.

in the Province. Where any such paper had published a statement relating to any policy or activity of the Provincial Government, the proprietor, editor, publisher or manager was to be bound, when so required by the Chairman of the Social Credit Board, to publish in the paper a statement of no greater length than, and of equal prominence and type with, the previous statement. The object of the chairman's statement was to be the correction or amplification of the previous statement, and it was to be stated that it was published by his direction. The Bill further provided that the proprietor, editor, publisher or manager of a paper should be obliged on requisition of the Chairman of the Social Credit Board to divulge the particulars of every source of information upon which any statement appearing in his paper was based.

Any contravention of the provisions of the Bill was liable to be punished by money penalties, and might entail the suspension of the paper or part of its material.

At the time when the three questions above stated were before the Supreme Court an Act entitled the Alberta Social Credit Act, c. 10, 1937 (First Session) was in force. It had received the assent of the Lieutenant-Governor of Alberta on April 14, 1937, and had been later amended by an Act assented to on August 6, of that year. The provisions of this Act, as amended, necessarily called for the careful examination of the Supreme Court, since the two Bills No. 8 and No. 9 could operate only if certain institutions created by and working under the Alberta Social Credit Act, i.e., the Provincial Credit Commission and the Social Credit Board, were in existence. Bill No. 8 required credit institutions carrying on business in the Province to obtain licences from the Provincial Credit Commission. That body, in the circumstances mentioned in the Alberta Social Credit Act, could suspend or revoke any licence, subject to a right of appeal to the Social Credit Board. As regards Bill No. 9, the Social Credit Board was entrusted with the most important duties under the Bill. It has happened, however, that since the order of the Supreme Court—namely, on April 8, 1938, the Alberta Social Credit Act was repealed by the Alberta

Legislature (1938, c. 4). In these circumstances the two Bills No. 8 and No. 9 cannot now be brought into operation, and, since nothing can be done thereunder, the appeal from the order of the Supreme Court is one of no practical interest. It is contrary to the long-established practice of this Board to entertain appeals which have no relation to existing rights created or purported to be created ; and their Lordships have, therefore, found it necessary to decline to hear arguments on this appeal in so far as it relates to Bills No. 8 and No. 9. Their Lordships, in taking this course, will only add that they do not intend to intimate any doubt as to the correctness of the decision of the Supreme Court as regards those Bills.

Bill No. 1, the "Act respecting the Taxation of Banks," is in a position different from that of the other two Bills. It contains no reference to the Alberta Social Credit Act. It purports to be concerned with taxation of a direct character, differing, however, from ordinary taxing statutes in that it singles out for taxation only banks which transact business in the Province. The word " bank " is defined as meaning "a "corporation or joint stock company, other than the Bank "of Canada, wherever incorporated and which is incorporated "for the purpose of doing banking business or the business "of a savings bank and which transacts such business in the "Province whether the head office is situate in the Province "or elsewhere." No other body, corporation, institution or person is the subject of taxation under the Bill. It is sought to be justified by s. 92 (2.) of the British North America Act, 1867, as being within the class of subjects described as "Direct taxation within the province in order to the raising "of a revenue for provincial purposes." It may be stated at the outset, if indeed it is not self-evident, that the mere fact that revenue to a greater or smaller amount would be raised in the Province by a highly selective measure of this unusual character is not sufficient to justify it as coming within s. 92. Under the guise of discriminatory taxation in the Province it would be easy not only to impair, but even to render wholly nugatory, the exclusive legislative authority of the Dominion over a number of the classes of subjects

J. C.
1938
ATTORNEY-GENERAL FOR ALBERTA
v.
ATTORNEY-GENERAL FOR CANADA.

specifically mentioned in s. 91 by making them valueless. Instances could be found in bills of exchange, and promissory notes, patents, and copyrights, which could be so heavily taxed as entirely to destroy their use as well as their value in the Province. A number of other illustrations could be given arising under s. 92 (10.). No one would suggest—and certainly counsel for the appellant in his able argument did not—that Provincial legislation of this character would be valid. Whether a Provincial Act, which indirectly interferes in some degree with one of the powers of the Dominion, is or is not ultra vires must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down: *John Deere Plow Co., Ld.* v. *Wharton* (1); *Great West Saddlery Co., Ld.* v. *The King* (2).

There are cases on each side of the line. For example, the decision of the Judicial Committee in *Russell* v. *The Queen* (3) is an authority on one side; the decisions in *Abbott* v. *City of Saint John* (4), *Forbes* v. *Attorney-General for Manitoba* (5), and *Judges* v. *Attorney-General of Saskatchewan* (6), may be cited on the other side. In the view of their Lordships these cases in no way conflict.

Admitting that a test applicable to every case of overlapping powers specified in ss. 91 and 92 is more than elusive, yet it is often comparatively easy to determine that the particular piece of legislation is an encroachment on a forbidden territory.

Some propositions may be stated that are not in dispute. Clearly, it is necessary in dealing with such a question to consider the whole scheme for distribution of powers contained in the two sections. The "classes of subjects" enumerated, looked at singly, overlap in many respects. It is obvious, for example, that currency, paper money, patents, trade-marks and so forth are different kinds of property, and therefore as a matter of verbal definition within s. 92 (13.); but this occasions no logical difficulty, for, as has been repeatedly observed, the concluding paragraph of s. 91 declares that any matter coming within any of the classes of subjects enumerated in that section "shall not be deemed to come within the class "of matters of a local and private nature" assigned exclusively to the Provinces. As pointed out in the judgment of Duff C.J. (concurred in by Davis J.), it is well established that if a given subject-matter falls within any class of subjects enumerated in s. 91, it cannot be treated as covered by any of those within s. 92: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); *Great West Saddlery Co., Ld.* v. *The King.* (2)

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(1) [1915] A. C. 330, 338, 339.
(2) [1921] 2 A. C. 91.
(3) (1882) 7 App. Cas. 829.
(4) (1908) 40 Can. S. C. R. 597.
(5) [1937] A. C. 260.
(6) [1937] 2 D. L. R. 209.

It is therefore necessary to compare the two complete lists of categories with a view to ascertaining whether the legislation in question, fairly considered, falls prima facie within s. 91 rather than within s. 92. The result of the comparison will not by itself be conclusive, but it will go some way to supply an answer to the problem which has to be solved.

The next step in a case of difficulty will be to examine the effect of the legislation: *Union Colliery Co. of British Columbia, Ld.* v. *Bryden.* (3) For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly, the Acts passed by the Provincial Legislature may be considered, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating, or intended to operate, or recently operating in the Province.

A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question. The language of s. 92 (2.), "Direct taxation within the province "*in order to the raising of a revenue* for provincial purposes" is sufficient in the present case to establish this proposition. The principle, however, has a wider application. It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other: *Attorney-*

(1) [1896] A. C. 348.
(2) [1921] 2 A. C. 91, 99.
(3) [1899] A. C. 580.

J. C.
1938

ATTORNEY-GENERAL FOR ALBERTA
v.
ATTORNEY-GENERAL FOR CANADA.

General for Ontario v. *Reciprocal Insurers* (1); *In re The Insurance Act of Canada.* (2) Here again, matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it. It must be remembered that the object or purpose of the Act, in so far as it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity, namely, the Legislature, and, generally speaking, the speeches of individuals would have little evidential weight.

If these principles are borne in mind, it appears to their Lordships, as it appeared to the Supreme Court, that the specific question that arises in relation to the Bill No. 1 presents no serious difficulty. In the first place, it is plain that the taxation is aimed simply at banks, including savings banks; and by s. 91 (15.) and (16.) " banking " and " savings banks " are within the exclusive legislative authority of the Dominion. On the other hand, it is strange to find the Province singling out, " in order to the raising of a revenue for provincial " purposes," banks and savings banks and no other wealthy corporation, body or persons in the Province.

Next, if the effect of the Bill is examined on the footing that it becomes operative in the Province, some remarkable facts emerge. As Kerwin J. (in a judgment concurred in by Crocket J.) observed (3):—" Our attention has been called to " the increase in the taxation of banks that would be effected " by the provisions of this Bill. As Provincial legislation stood " prior to the First Session of the Alberta Legislature in 1937, " the tax on all banks doing business in the province amounted " to $72,200 per annum. By chapter 57 of that session a tax " was imposed which would increase the sum realised by " $140,000 per annum. The additional tax proposed by Bill 1 " amounts to $2,081,925 in each year."

It does not seem to be necessary to set out the undisputed tables of figures showing the particulars of this gigantic increase in the taxation of banks within the Province. Their Lordships do not disagree with the Chief Justice and Davis J. that the facts are sufficient (1) "to show that such a rate of taxation "must be prohibitive in fact and must be known to the "Alberta Legislature to be prohibitive." In coming to this conclusion it seems to their Lordships that the learned judges were justified in considering that the magnitude of the tax proposed for Alberta was such that, if it were applied by each of the other Provinces, it would have the effect of preventing banks from carrying on their businesses. It would be strange if each of the Provinces were successively to tax banks and the result on the question of ultra vires were to be that the Acts of those Provinces who were earliest in the field were valid, whilst the Acts of those who came a little later were to be held ultra vires. It must be remembered in this connection that the tax proposed is based on the paid-up capitals and on the reserve funds of the banks wherever situate.

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(1) [1924] A. C. 328, 342.
(2) [1932] A. C. 41.
(3) [1938] Can. S. C. R. 147.

It was rightly contended on behalf of the appellant that the Supreme Court and the Board have no concern with the wisdom of the Legislature whose Bill is attacked ; and it was urged that it would be a dangerous precedent to allow the views of members of the Court as to the serious consequences of excessive taxation on banks to lead to a conclusion that the Bill is ultra vires. Their Lordships do not agree that this argument should prevail in a case where the taxation in a practical business sense is prohibitive. If, however, any doubt could be entertained on the question of fact, there is in this case a further point which seems to their Lordships to be decisive.

In their opinion, it was quite legitimate to look at the legislative history of Alberta as leading up to the measure in question, including the attempt to create a new economic era in the Province. At the time when the Bill was passing through the Legislature the most profound and far-reaching changes in the operations of commerce, trade, and finance were intended by Bills before the Provincial Legislature and by Acts already passed. It was plain that banks and savings banks operating in Alberta might greatly interfere with those proposed changes. The examination of the Province of Alberta Social Credit Act leaves little doubt that the Act was an attempt to regulate and control banks and banking in the Province. In the second 1937 session an Act called " The "Credit of Alberta Regulation Act" was passed. The recitals in that Act are as follows :—" Whereas the extent to which " property and civil rights in the Province may be enjoyed " depends upon the principles governing the monetization of " credit and the means whereby such credit is made available " to the Province and to the People collectively and individ- " ually of the Province ; and

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(1) [1938] Can. S. C. R. 128.

" Whereas it is expedient that the business of banking in " Alberta shall be controlled with the object of attaining for the " People of Alberta the full enjoyment of property and civil " rights in the Province."

In the same session an Act entitled " An Act to provide for " the Restriction of the Civil Rights of Certain Persons " was passed, and it contains a similar recital. Both these latter Acts were part of the general scheme of social credit legislation in Alberta. Their Lordships agree with the opinion expressed by Kerwin J. (concurred in by Crocket J.) that there is no escape from the conclusion that, instead of being in any true sense taxation in order to the raising of a revenue for Provincial purposes, the Bill No. 1 is merely (1) " part of a legislative plan " to prevent the operation within the Province of those " banking institutions which have been called into existence " and given the necessary powers to conduct their business by " the only proper authority, the Parliament of Canada." This is a sufficient ground for holding that the Bill is ultra vires.

There are other and narrower grounds on which the validity of Bill No. 1 has been attacked, but in view of the above conclusions it does not seem to be necessary to deal with them in any way.

Their Lordships think, however, that it may be useful to make some observations on the well-known and often cited decision of the Board in *Bank of Toronto* v. *Lambe*. (2) That case seems to have occasioned a difficulty in the minds of some of the learned judges in the Supreme Court. It must, however, be borne in mind that the Quebec Act in that case was attacked on two specific grounds, first, that the tax was not "taxation "within the Province," and secondly, that the tax was not a "direct tax." It was never suggested, and there seems to have been no ground for suggesting, that the Act was by its effect calculated to encroach upon the classes of matter exclusively within the Dominion powers. Nor, on the other hand, was there any contention, however faint or tentative, that the purpose of the Act was anything other than the legitimate one of raising a revenue for Provincial needs.

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(1) [1938] Can. S. C. R. 151.

(2) 12 App. Cas. 575.

It is, moreover, important to note that the taxes were not directed against a particular class of business or employment, but were imposed within the Province on every bank, insurance company, incorporated company carrying on any labour, trade or business in the Province, and on a number of other specified companies. Nor was it suggested that the taxation was of such a character that it might hamper the Dominion in exercising their powers under s. 91. In these circumstances, Lord Hobhouse, in delivering the judgment, refuted a contention on behalf of the appellants (1) in language which, as it seems to their Lordships, has sometimes been misunderstood. Its true meaning may be appreciated by stating in effect the argument to which it was addressed in the following form :—" A bank is an institution which comes "within the words of s. 91 (15.). To tax a bank with sufficient "severity would destroy it. Therefore the Province cannot "tax a bank at all." The answer of the Judicial Committee in substance was no more than this :—" You are asking the Board "to imply in s. 91 a proviso to the effect that if a power "expressly given to the Provinces is capable, by a particular "and unusual application, of infringing a power given to the "Parliament of Canada, then no similar use of the Provincial "power, however moderate, can be permitted under any circumstances. The answer is that the Legislature, in passing "the British North America Act, did not assume that a misuse "of the Provincial powers was likely to occur and accordingly "had to be provided for. No such proviso can therefore be "implied." It was never laid down by the Board that if such a

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(1) 12 App. Cas. 586–7.

J. C.
1938
ATTORNEY-GENERAL FOR ALBERTA
v.
ATTORNEY-GENERAL FOR CANADA.

use was attempted to be made of the Provincial power as materially to interfere with the Dominion power, the action of the Province would be intra vires. To quote the actual language of the Board, they said (1) :—" If [the Judges] find " that on the due construction of the Act a legislative power " falls within s. 92, it would be quite wrong of them to deny " its existence because by some possibility it may be abused, " or may limit the range which otherwise would be open to " the Dominion parliament." This proposition is no more than what was stated in precise terms by Davies J. in *Abbott* v. *City of Saint John* when he observed (2) :—" Time and again the "Judicial Committee have declined to give effect to this " anticipatory argument or to assume to refuse to declare " a power existed in the Legislature of the Province simply " because its improvident exercise might bring it into conflict " with an existing power of the Dominion." Their Lordships are not aware of any decision of the Board which travels beyond the proposition laid down in *Lambe's* case (3) as explained above.

Their Lordships were invited to deal with the question of costs, but on the whole they did not think it right to depart from the usual practice which has obtained in deciding constitutional questions of the nature of those arising in this case.

The above were the reasons which influenced their Lordships in humbly tendering to His Majesty their advice to dismiss the appeal.

Solicitors for the appellant : *Blake & Redden.*

Solicitors for the Attorney-General for Canada and for the Alberta Press : *Charles Russell & Co.*

Solicitors for the Canadian Press and Newspapers Associations and for the Chartered Banks of Canada : *Lawrence Jones & Co.*

(1) 12 App. Cas. 587.
(2) 40 Can. S. C. R. 606.
(3) 12 App. Cas. 575.

[PRIVY COUNCIL.]

J. C.*
1938
Nov. 17.

CADIJA UMMA AND ANOTHER . . . . APPELLANTS;

AND

S. DON MANIS APPU . . . . RESPONDENT.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

Ceylon—Prescriptive title to land—Ordinance No. XXII. of 1871, *s.* 3—*Construction.*

By s. 3 of Ordinance No. XXII. of 1871 of Ceylon, "Proof of "the undisturbed and uninterrupted possession by a defendant in "any action . . . . of lands or immovable property, by a title "adverse to or independent of that of the claimant or plaintiff "in such action (that is to say, a possession unaccompanied by "payment of rent or produce, or performance of service or duty, or "by any other act by the possessor, from which an acknowledgment "of a right existing in another person would fairly and naturally be "inferred) for ten years previous to the bringing of such action, "shall entitle the defendant to a decree in his favour . . . .":—

Held, that the parenthetical clause in s. 3 is not a mere illustration referring to "undisturbed and uninterrupted possession," but is a statement of what is meant by the full phrase "possession . . . . by "a title adverse to or independent of that of the claimant or "plaintiff," and its purpose is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription.

Corea v. *Appuhamy* [1912] A. C. 230; 15 C. N. L. R. 65, referred to.

Dictum of Bertram C.J. in *Tillekeratne* v. *Bastian* (1918) 21 C. N. L. R. 12, at p. 17, disapproved.

Judgment of the Supreme Court of the Island of Ceylon affirmed.

CONSOLIDATED APPEAL (No. 9 of 1937) from a judgment (January 18, 1936) and two decrees (January 22, 1936) of the Supreme Court of the Island of Ceylon, which had affirmed two judgments and decrees of the District Court of Colombo (March 23, 1933).

The first of the two actions out of which this consolidated appeal arose was brought on April 16, 1930, by the appellants, I. L. M. Cadija Umma and A. R. Mohamed Ameen, against four

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* *Present:* LORD ATKIN, LORD MACMILLAN, LORD PORTER, SIR LANCELOT SANDERSON, and SIR GEORGE RANKIN.

J. C.
1938
CADIJA UMMA
v.
S. DON MANIS APPU.

defendants, of which the first was S. Don Manis Appu, and the others were his tenants, claiming to recover possession of the suit lands of which the first appellant claimed to be the owner, as life tenant, the second appellant claiming as remainderman entitled absolutely subject to the first appellant's life interest.

The second action was instituted on April 25, 1930, by I. L. M. Cadija Umma and one A. R. Mohamed Hathy (since deceased) against S. Don Manis Appu only. The claim was in respect of another contiguous plot of land, and the relief claimed was identical with that claimed in the first action, save that wrongful possession was alleged only against S. Don Manis Appu, the first respondent.

The first respondent pleaded in each action that he and his predecessors in title had been in undisturbed and uninterrupted possession of the disputed land by title adverse to and independent of the appellants' title for over seventy years, and had acquired under Ordinance No. XXII. of 1871 a prescriptive title thereto.

The facts and the terms of s. 3 of the Ordinance appear from the judgment of the Judicial Committee.

The District Judge dismissed both actions.

On appeal, the Supreme Court (Akbar and Poyser JJ.) affirmed the decrees of the District Judge. Without pronouncing upon the issue of the appellants' title, they proceeded solely on the ground that the first defendant had acquired a prescriptive title under Ordinance No. XXII. of 1871.

1938. Oct. 25. *L. M. D. de Silva K.C.* and *Stephen Chapman* for the appellants. The findings of fact on which the prescriptive possession is based are two :—First, that grass was cut from time to time on behalf of the defendants and their predecessors in title. It is submitted that the cutting of grass from time to time from a place such as this is not sufficient possession within the meaning of s. 3 of Ordinance No. XXII. Secondly, with regard to the date of the erection of the buildings on the land, the District Judge does not refer to a date, and it is submitted that that is where he made a mistake. If the evidence of the defendant and his witnesses

J. C.
1938
CADIJA UMMA
v.
S. DON MANIS APPU.

is accepted it will be found that none of these buildings was put up before 1922, that is, within ten years of the bringing of the action in 1930.

It is submitted that possession alone is not sufficient ; the section says that it must be by " adverse title " ; there must be something corresponding roughly to the justus titulus of the Roman law—the person in possession must think that he is the owner, and must have some deed which gives him the impression that he is the owner, and without that it is not possible for him to get title under the section. That point has not been decided in any case in Ceylon, although the Judicial Committee of the Privy Council have gone some way in upholding it. Roman Dutch law has been departed from in this Ordinance, and it is suggested that when the section uses the words "title adverse " it introduces the idea of the Roman law, or something corresponding to it. The Privy Council has held that the words in parenthesis in s. 3, although they come after the words "title adverse" refer only to possession : *Corea* v. *Appuhamy* (1). [Reference was also made to *Tillekeratne* v. *Bastian* (2) in regard to the qualification of possession in s. 3.] The late Mr. Justice Walter Pereira in "The Laws of Ceylon," 2nd ed., at p. 388, set out the view now submitted for the appellants ; and on pp. 389–90 he expressed the contrary view. If the view on p. 388 is accepted, then something more than adverse possession is necessary. It is conceded that in none of the cases in Ceylon have the Courts upheld what the appellants are now submitting ; in fact, they have assumed in a number of cases subsequent to this that adverse possession is sufficient.

The respondents did not appear.

Nov. 17. The judgment of their Lordships was delivered by SIR GEORGE RANKIN. The appellants, on April 16 and 25, 1930, brought in the District Court of Colombo two actions to recover possession of two contiguous plots of land, measuring in the aggregate 2 acres and 38 perches, and forming a triangular area to the north of land which is admittedly theirs. The disputed land is known as Maha Ettambagaha Kumbura. In the first suit they impleaded four defendants as being in wrongful possession, S. Don Manis Appu being the first defendant. In the second suit he was the sole defendant. The District Judge dismissed both actions on March 23, 1933, finding against the appellants on the issue as to title, and also on the question whether the first defendant had acquired a prescriptive title under Ordinance XXII. of 1871. The Supreme Court, on January 22, 1936, affirmed the decrees of the District Judge. Without pronouncing upon the issue as to the appellants' title, the learned judges of the Supreme Court proceeded solely upon the ground of prescription under the Ordinance. The defendants have not appeared at the hearing of this appeal by the Board.

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(1) [1912] A. C. 230, 234 ; 15 C. N. L. R. 65, 76.
(2) 21 C. N. L. R. 12, 17.

The two acres (or thereabouts) now in dispute are said by the District Judge to be to a great extent swamp on which lotus grows; he states that on the portion which is not swampy there is a little wild grass, and buildings which have been put up from time to time. Akbar J. (with whose judgment Poyser J. agreed) says that the fact appears to be that the portion in dispute was at one time liable to be flooded and water-logged, but that now, owing to a bund built by the Government, the floods do not seem to affect the portion in dispute.

Sect. 3 of Ordinance No. XXII. of 1871, so far as applicable to this case, is in the following terms:—

" Proof of the undisturbed and uninterrupted possession by "a defendant in any action, or by those under whom he claims, "of lands or immovable property, by a title adverse to or "independent of that of the claimant or plaintiff in such action "(that is to say, a possession unaccompanied by payment of "rent or produce, or performance of service or duty, or by any "other act by the possessor, from which an acknowledgment "of a right existing in another person would fairly and "naturally be inferred) for ten years previous to the bringing "of such action, shall entitle the defendant to a decree in his "favour with costs. And in like manner, when any plaintiff "shall bring his action, or any third party shall intervene in "any action for the purpose of being quieted in his possession "of lands or other immovable property, or to prevent encroach-"ment or usurpation thereof, or to establish his claim in any "other manner to such land or other property, proof of such "undisturbed and uninterrupted possession as hereinbefore "explained, by such plaintiff or intervenient, or by those under "whom he claims, shall entitle such plaintiff or intervenient "to a decree in his favour with costs. Provided that the said "period of ten years shall only begin to run against parties "claiming estates in remainder or reversion from the time "when the parties so claiming acquired a right of possession to "the property in dispute."

Both Courts are in agreement on certain important facts affecting the applicability of this section. In particular, both accept the evidence of a witness called Podi Singho, who deposed that from 1911 he had grass from the disputed land cut by his own servants and paid the first defendant's mother (Getho Hamy) for it at the rate of ten cents for a bag of grass. This, according to his statements, continued for five or six years from 1911 until Getho Hamy was taken to the leper asylum; and thereafter he paid the money to the first defendant until 1930 or thereabouts, when the land began to be more occupied and there was no grass to be cut. Both Courts have likewise accepted as true the evidence of the second defendant, Abraham, that for the last ten or eleven years (that is, from 1922–3) he had been living on the disputed land with the permission of Getho Hamy, and put up a house for himself thereon at a ground rent paid to her, and afterwards to the first defendant. This witness further stated that besides his own there are eight houses on the land in suit, of which three were put up by himself at Getho Hamy's request about 1925, and three by the first defendant about 1929–30. The District Judge has expressly accepted these statements as true.

On these facts the Supreme Court considered that it was impossible to say that the District Judge had come to a wrong conclusion in holding that the first defendant and his mother had been in adverse possession for the period required by law. It has been argued before their Lordships that, as the buildings are not shown to have come into existence before 1922 or 1923, the ten years before action are not covered by this part of the evidence, which, to satisfy the Ordinance, would require to extend so far back as 1920. Also that the mere taking of wild grass being conduct which an owner of swampy land would not necessarily be minded to resist is an insufficient foundation for a finding of possession in the earlier years, especially as grass cannot be cut all the year round, but only (as the second defendant stated) for six or eight months according to the weather. Mr. de Silva, for the appellants, has sought very reasonably to lay stress upon the facts that his clients appear to have paid municipal rates upon the disputed land as part of their total holding until 1929, and that in 1912 they exercised their right of occupation in the disputed land by obtaining a consent decree against a third party in ejectment.

While recognising that the sufficiency of the defendants' evidence of possession for the first two or three years after 1920 is debateable, their Lordships are not of opinion that in this case the concurrent findings of the Courts below should be departed from. The evidence as to the cutting of grass is not merely that the first defendant and his mother were allowed to take some grass, but that they were allowed to sell it to the overseer in charge of the cattle segregation camp ; and that this was continued over a number of years, and at a time when the grass was the only, or at least the main, advantage accruing from the land. The evidence as to buildings put upon the land after 1923 is, if believed, very strong to show possession, and is not without a bearing upon the earlier years as interpreting the acts of the first defendant and his mother with respect to the grass, even if these might otherwise be thought to be ambiguous.

Taking the evidence fairly and as a whole, their Lordships see no reason to think that the Courts in Ceylon have misinterpreted it ; indeed the question of the value of the taking of the grass as evidence of possession is one on which the opinion of the local courts is entitled to some special weight owing to their familiarity with the conditions of life and the habits and

J. C.
1938
CADIJA UMMA
v.
S. DON MANIS APPU.

ideas of the people. It cannot be held that the Courts in Ceylon were obliged to regard the evidence as establishing no more, in respect of the earlier years, than a permissive taking of grass by or on behalf of the first defendant and his mother. The finding of possession for ten years before suit must therefore be upheld. It follows, in their Lordships' opinion, that the appellants' suit must fail, since the character of the possession held by the first defendant and his mother was clearly adverse to the appellants and satisfies s. 3 of the Ordinance.

Mr. de Silva contended, however, that the section should be construed as introducing the requirement known to the Roman law as justus titulus or justa causa—the words "by a title "adverse to or independent of that of the claimant or plaintiff" being construed as requiring the defendant to prove that his possession was on the footing of some title, however imperfect, and not wholly without right. Learned counsel had, however, to admit that the law of Ceylon recognised no such doctrine at the date of the passing of the Ordinance, and their Lordships find it impossible to interpret the section as introducing it.

This opinion does not rest solely upon the words enclosed in brackets by way of explanation or definition—"(that is to say, a possession . . . . inferred)," but is supported also by the absence of any words calculated to define or assert the special doctrine of justa causa. There is a passage in the judgment of the Board delivered by Lord Macnaghten in *Corea* v. *Appuhamy* (1) which supports (without discussion of the matter) the opinion that the parenthetical clause above mentioned is intended as an explanation of the words "undisturbed and "uninterrupted possession" and not as a statement of what is meant by the full phrase previously employed "possession . . . . "by a title adverse to or independent of that of the claimant "or plaintiff." It appears that the late Mr. Justice Walter Pereira in his work on "The Laws of Ceylon" suggested as a possible view that the words in parenthesis were "intended "to be explanatory of the expression 'possession' only"; but that his own opinion was that they "do not contain an "illustration, but are by themselves a full and self-contained

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(1) [1912] A. C. 230.

J. C.
1938
Cadija Umma
v.
S. Don Manis Appu.

"definition of the expression, 'possession by a title adverse "'to and independent of that of others'" [2nd ed., pp. 388, 390]. Departing widely from this learned author's opinion, Bertram C.J. (in *Tillekeratne* v. *Bastian* (1)) relying on Lord Macnaghten's language in *Corea's* case (2), held that "the "parenthesis has no bearing on the question of the meaning "of the words 'adverse title'; it may henceforth be left out "of account in the discussion of the question." Their Lordships cannot accept this dictum of the learned Chief Justice. The section in its second half discloses the standpoint of the draughtsman by a phrase to which Lord Macnaghten's words may perhaps be attributed—"proof of such undisturbed and "uninterrupted possession as hereinbefore explained, by such "plaintiff . . . . shall entitle such plaintiff . . . . to a decree in "his favour with costs." The explanation thus pointed to includes not merely the requirement of adverse or independent title, but also the period of ten years. The words "undisturbed "and uninterrupted" are, however, repeated; indeed the parenthetical clause does not seem to contain any direct reference to acts other than acts of the possessor having a bearing upon the question of an acknowledgment by him. Their Lordships are unable to doubt that the purpose—perhaps the somewhat ambitious purpose—of the parenthetical clause is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription. While, however, the clause is no mere illustration, it is not so completely successful an attempt to achieve the "full and self-contained definition" as might be wished. A phrase having been introduced and then defined, the definition prima facie must entirely determine the application of the phrase; but the definition must itself be interpreted before it is applied, and interpreted, in case of doubt, in a sense appropriate to the phrase defined and to the general purpose of the enactment. Thus, in a case where A's possession has been on behalf of B, or has been the possession of B (whether by reason of agency or co-ownership), it seems impossible to apply this definition clause as between B and A so as to defeat

(1) 21 C. N. L. R. 12, 17.

(2) [1912] A. C. 230.

J. C.
1938
CADIJA UMMA v. S. DON MANIS APPU.

the rights of B. It cannot be applied to defeat the rights of a person in possession. Under what conditions an agent or co-owner can be heard to say that his possession has been an ouster of his principal or co-sharer is a matter which need not here be examined. Ouster apart, a man's possession by his agent is not dispossession by his agent. The like is true between co-owners in Ceylon, and is the ground of decision in *Corea's* case (1).

Their Lordships will humbly advise His Majesty that this consolidated appeal fails and should be dismissed. The respondents not having appeared there will be no order as to costs.

Solicitor for appellants: *O. A. Cayley.*

(1) [1912] A. C. 230.

[PRIVY COUNCIL.]

PYRMONT, LIMITED, AND ANOTHER . . APPELLANTS ;

AND

SCHOTT . . . . RESPONDENT.

J. C.*
1938
Dec. 1.

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR.

Gibraltar—Contract—Loan at Gibraltar by cheque in Spanish pesetas—Bond securing repayment of pesetas—Spanish Government decree making " guias " necessary for legal importation of Bank of Spain notes—Loan repayable by peseta notes with " guias " or their equivalent in sterling.

The appellants, in May, 1935, borrowed in Gibraltar from the respondent by means of a cheque drawn on a bank in Gibraltar 500,000 Spanish pesetas, and executed a bond, dated May 22, 1935, whereby they bound themselves to repay to the respondent 500,000 pesetas at Gibraltar on May 22, 1936, with interest thereon at 3½ per cent. per annum. At the date of the loan, Spanish pesetas—the unit of account in Spanish currency—although not legal tender in Gibraltar, were in frequent use there in commercial transactions. On March 16, 1936, the Spanish Republican Government having enacted a decree prohibiting the exportation of any notes of the Bank of Spain unless accompanied by an authorization called a " guia," issued by the customs authorities, it thereafter became illegal for notes to be reintroduced into Spain unless accompanied by " guias " corresponding in amount to the pesetas proposed to be brought in. After the date of that decree there were in use in Gibraltar peseta notes both accompanied and unaccompanied by " guias," and the former, since they could be remitted to Spain, were of a higher value than the latter. The respondent, having refused in repayment of the loan a tender by the appellants of a bundle of 500,000 peseta notes unaccompanied by " guias," brought an action claiming a sum in pounds sterling equivalent to the principal due under the bond at the rate of 36.80 pesetas to the pound, which was the rate of exchange for peseta notes accompanied by " guias," and interest thereon :—

Held, that the contract was for the supply and return in Gibraltar of pesetas as commodities, not money ; that the word " peseta " meant the unit of account in the currency of Spain, and that the obligation was to pay in whatever at the date of repayment was legal tender and legal currency in Spain, the foreign country whose money was lent. The appellants had contracted

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* *Present :* LORD ATKIN, LORD PORTER, and SIR LANCELOT SANDERSON.

J. C.
1938
PYRMONT, LD. v. SCHOTT.

to pay 500,000 of such units of account, and not 500,000 peseta notes; such notes were not units of account of the Spanish Republic, and the contract was not fulfilled by the tender of 500,000 peseta notes.

In re Chesterman's Trusts. Mott v. *Browning* [1923] 2 Ch. 466, applied.

British Bank for Foreign Trade, Ld. v. *Russian Commercial and Industrial Bank* (1921) 38 Times L. R. 65, referred to.

Judgment of the Supreme Court of Gibraltar affirmed.

APPEAL (No. 43 of 1937) from a judgment of the Supreme Court of Gibraltar (April 9, 1937).

The appellants, Pyrmont, Ld., incorporated in Gibraltar, and carrying on business as an investment company, and John Mackintosh, a director of that company, borrowed in Gibraltar in May, 1935, 500,000 Spanish pesetas from the respondent, Lucila Schott, who had on deposit at Barclays Bank in Gibraltar a credit of over that sum standing in the names of the trustees of her late husband. The loan was made by a cheque drawn on Barclays Bank, Gibraltar, and signed by the above mentioned trustees; and the appellants executed a bond, dated May 22, 1935, whereby they bound themselves to pay to the respondent the sum of 500,000 pesetas on May 22, 1936, with interest at 3½ per cent. per annum, payable half-yearly.

Spanish pesetas, the units of Spanish currency, although not legal tender in Gibraltar, were in frequent use there, and were regularly given and taken as payment in commercial transactions. By a decree of the Government of Spain, dated March 16, 1936, travellers were prohibited from exporting from Spain any notes of the Bank of Spain unless accompanied by an authorization called a "guia." After the date of that decree it became illegal for notes to be introduced into Spain unless accompanied by "guias" corresponding in amount to the pesetas proposed to be brought in. There were in fact in use in Gibraltar after the date of the decree two types of peseta notes—those accompanied by "guias," and those unaccompanied, the latter being either those already there before the decree, or those subsequently brought in by refugees. The notes with "guias," since they could be remitted to Spain, were of higher value than those without "guias."

The appellants, in repayment of the loan, in due course tendered a bundle of 500,000 peseta notes without "guias." That tender was refused by the respondent, who brought the action out of which this appeal arose, claiming from the appellants a sum in pounds sterling equivalent to the principal due under the bond at the rate of 36.80 pesetas to the pound—the rate of exchange for peseta notes accompanied by "guias"—and interest thereon.

The appellants by their defence pleaded (inter alia) that the respondent was not entitled to receive as payment under the bond Spanish bank-notes with "guias," but only payment of the amount due in bank-notes of the Bank of Spain, which, they said, were legal Spanish currency.

Further facts appear from the judgment of the Judicial Committee.

The Supreme Court of Gibraltar (Beatty C.J.) in the result gave judgment for the respondent for 13,586*l.* 19*s.* 1*d.*, being the amount claimed by her, with interest at 3½ per cent. from June 20, 1936, to the date of judgment, and judgment, dated April 9, 1937, was accordingly entered for the respondent for 13,969*l.* 19*s.* 10*d.*

1938. Oct. 18, 20, 21. *H. U. Willink K.C.* and *John Lawrence* for the appellants. At the date of the decree of March 16, 1936, gold was not in circulation in Spain, and the export of silver had been prohibited earlier, so that the decree was really only applicable to notes of the Bank of Spain. One effect of the decree was that the uses to which peseta notes could be put by persons outside Spain were limited. Peseta notes were still circulating freely in Gibraltar, but those accompanied by "guias" fetched a higher price there than notes unaccompanied by "guias," and the substantial issue in this case, as stated by the Chief Justice, is whether the respondent is entitled to demand either payment by Bank of Spain notes with "guias" or the sterling equivalent, or whether, as the appellants contend, the debt can be satisfied

J. C.
1938
PYRMONT, LD.
v.
SCHOTT.

by payment in Bank of Spain notes without "guias." It is submitted that the obligation could be satisfied without "guias," which were merely a customs instrument not affecting the currency of Spain in any way ; the decree did not change Spanish currency, it only imposed restrictions on its export and import. When the contract is examined and construed in the light of the surrounding circumstances, it is one under which the appellants were entitled to pay by a cheque on which peseta notes could be obtained, or, alternatively, by tender of peseta notes. The respondent, having asked for repayment in pesetas, was taking the risk of what the Government of Spain might do with regard to the availability in Spain, or the complete withdrawal or recall, of that form of peseta currency. The risk is upon the respondent. The contract she made was one in pesetas ; to be performed in pesetas ; and it is doing great violence to the contract and the surrounding circumstances to say that it was a contract performable in sterling and giving rise to a sterling debt. It was not performable in sterling at all, but only in pesetas. In the absence of any authority, there is no reason in English law why the parties should not make a contract performable by the physical delivery of foreign currency, and not performable in sterling at equivalent amounts. This, in all the circumstances, is such a contract.

In deciding what foreign currency is referred to the surrounding circumstances must be taken into account. The real question is, if this was a promise of foreign currency, what was the peseta which was promised to be delivered? It could not have been pesetas with "guias," because they were not in existence when the contract was made ; it could not have been gold pesetas, because they were not in circulation ; and it could not have been silver, because on the evidence transactions of this size were never done in silver pesetas. It could only be one of two things : (*a*) a cheque on a proper bank for pesetas ; or (*b*) peseta notes themselves. The "guia" decree had no operation in Gibraltar. There is no indication that the appellants had promised that the notes should have any qualified availability, and therefore it was for the appellants to tender delivery of something which they had promised to deliver under the contract—primarily notes, and when they tendered delivery they were ready and willing to perform the contract. Questions of tender are irrelevant; the only question is whether the appellants showed that they were ready and willing to perform. Sect. 6 of the Coinage Act, 1870, does indicate that there may be contracts performable by the delivery of foreign currency. "Currency" consists of those physical instruments or objects in which a sovereign State permits its units of account to be expressed or take physical form.

H. I. P. Hallett K.C. and *Stephen Chapman* for the respondent. The main heads of argument are, first, whether the obligation under the bond had in any way been varied. Secondly, assuming that only the bond is to be looked at, what is the true nature of the obligation? Thirdly, in what way could the obligation be performed? Fourthly, was it so performed? And fifthly, if not, what are the consequences in point of law of the breach? With regard to the first point, there is no evidence that the respondent authorized any variation of the obligation under the bond. As to the true nature of the obligation, there can be a contract which is made, executed and entered into according to the currency of some British possession or some foreign State (s. 6 of the Coinage Act, 1870), but what the effect of that contract is, what precise obligation it gives rise to, depends on the nature of the contract and the surrounding circumstances. This case must be distinguished from such a case as *S.S. Celia* v. *S.S. Volturno* (1), and also from cases arising on bills of exchange. [Reference was made to *Pollard* v. *Herries* (2); *Suse* v. *Pompe* (3); *Cohn* v. *Boulken* (4); and the Bills of Exchange Act, 1882, s. 9, sub-s. 1 (*d*), and s. 72, sub-s. 4.] The bills of exchange cases stand in a category of their own. In any case, if there be a breach of an obligation, one must always distinguish between the remedy and the manner in which that remedy can be afforded by the Courts, and the nature of the obligation itself: *Anderson* v. *Equitable Assurance Society of the United States.* (1)

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(1) [1921] 2 A. C. 544, 553.
(2) (1803) 3 Bos. & P. 335.
(3) (1860) 8 C. B. (N. S.) 538, 542.
(4) (1920) 36 Times L. R. 767.

This is not a case where the obligation, as on a bill of exchange, is at the end to hand back to the respondent the sterling equivalent of 500,000 pesetas. It is an obligation to repay 500,000 pesetas, and where there is a contract to deliver something expressed in a foreign unit of account, as here, 500,000 pesetas, that foreign unit of account connotes the means of payment, and the means of payment which it connotes in a case such as the present is that which would be legal tender in respect of that foreign unit of account in the foreign country to which that unit of account belongs. If one party undertakes to deliver 500,000 pesetas to another party, the one ought to deliver and the other receive the same equivalent whether the place of payment be the place where the foreign unit of account belongs or whether it be some other country. [Reference was made to *Auckland Corporation* v. *Alliance Assurance Co., Ld.* (2)] This claim on this bond is in respect of a loan of a commodity, and the contract is for the return of what was lent. What was lent, both according to the language of the bond and the true facts as ascertained in the evidence, were not notes, but pesetas. Where there is a contract to deliver something expressed in terms of foreign units of account, which connote the foreign means of discharge, then whether the question is what amount of sterling is required to discharge that obligation, or whether, as here, what sum in sterling ought to be awarded as compensation for not discharging the obligation, in each case, before the amount in sterling can be assessed, what is the foreign means of discharge of which the sterling should be the equivalent must be ascertained. And in ascertaining what that foreign means of discharge is regard must be had to what is legal tender in the country to which the foreign means of discharge belongs. This argument is supported by reason, because in every case the foreign means of discharge

(1) (1926) 134 L. T. 557.

(2) [1937] A. C. 587, 604.

J. C.
1938
PYRMONT, LD.
v.
SCHOTT.

must ultimately be repatriated, and when it is repatriated it must be the means of discharge which the law of the country authorizes. In each of the following cases there was an obligation expressed in foreign units of account, in each case the place of payment was not the country to which the foreign unit of account belonged, and in each case the amount of payment was determined by a consideration of what according to the law of the country would be legal tender of that country: *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (1); *In re Chesterman's Trusts. Mott* v. *Browning* (2); *Anderson* v. *Equitable Assurance Society of the United States* (3); and *Ottoman Bank of Nicosia* v. *Chakarian.* (4) These cases are, up to a point, the converse of the present case. The test is, were peseta notes legal tender in Spain? The cases just cited are of assistance, but no case is a direct authority on the problem raised in this case.

If tender is made out of time, and also of the wrong thing, then that offer is of no value at all, and the respondent becomes entitled to judgment for the sterling equivalent as at the agreed time.

H. U. Willink K.C. replied. The circumstances of this contract, both as to the place where it was made, and in respect of the free circulation of a denomination known only to a foreign country, are very special. Neither *Ottoman Bank of Nicosia* v. *Chakarian* (4) nor *Anderson* v. *Equitable Assurance Society of the United States* (3) is really of any assistance where the Court is considering a contract for the delivery of a commodity. *In re Chesterman's Trusts. Mott* v. *Browning* (2) is not really any authority on this contract; all the remarks in that case were made with such a different state of facts in mind. Nor is *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade, Ld.* (1) an authority for this contract. The respondent is really seeking to add to peseta notes the words "freely importable into and "exportable out of Spain," which, it is submitted, cannot be added to a contract of this nature.

(1) [1921] 2 A. C. 438.
(2) [1923] 2 Ch. 466.
(3) 134 L. T. 557.
(4) [1938] A. C. 260.

Dec. 1. The judgment of their Lordships was delivered by LORD PORTER. The appellant company are incorporated in Gibraltar, and carry on business as an investment company. The appellant, John Mackintosh, is a director of that company. In May, 1935, the appellants were anxious to borrow a large sum of Spanish pesetas, as they did not wish to convert English pounds sterling into that currency, and at that time the respondent had on deposit at Barclays Bank in Gibraltar a credit of over 500,000 pesetas, standing in the names of Messrs. Carrara, King and Marsh, who were trustees of her late husband. The respondent is an old lady, eighty-two years of age, whose business affairs were managed by her nephew, one Eugenio Gross.

Mr. King, who was a friend of both Mr. Mackintosh and the respondent, having heard that the appellants desired to borrow pesetas, approached Mr. Mackintosh and arranged with him that the respondent should lend and the appellants borrow the sum of 500,000 pesetas at 3½ per cent. interest per annum.

Accordingly, the appellants executed a bond, dated May 22, 1935, whereby they bound themselves to pay the respondent the sum of 500,000 pesetas on May 22, 1936, and meanwhile to pay interest at 3½ per cent. per annum by half-yearly instalments on November 22, 1935, and May 22, 1936. Upon the execution of the bond, Mr. Pons, the accountant employed by the trustees, prepared and filled in a cheque for 500,000 pesetas drawn on Barclays Bank, Gibraltar, and the cheque was signed by the trustees in whose name the credit stood.

The cheque was then handed to Mr. Mackintosh, or to his secretary, Mr. Caston, and paid into the appellants' account at Barclays Bank. From time to time the appellants drew cheques varying in value between 6000 and 70,000 pesetas upon this account, and the whole amount was so withdrawn by the appellants before the end of the year 1935. Meanwhile, on November 22, 1935, the half-year's interest was duly paid.

Before and up to 1898 Spanish peseta coinage was legal tender in Gibraltar, but by an Order in Council of August 9 of that year, sterling money of Great Britain became the only legal tender, subject to certain exceptions not material to the present case. Nevertheless, pesetas were in frequent use, and were regularly given and taken as payment in commercial transactions in Gibraltar.

The peseta was, and remains, the unit of Spanish currency. It is common ground that at all material times gold coins without limit, and silver coins of 5 pesetas, alone were legal tender in Spain. It is true that the Bank of Spain were authorized to issue peseta notes, and that for certain purposes, e.g., the payment of sums due to the Government, those notes must be accepted, but in ordinary transactions between individuals they could be refused. In practice, of course, they were accepted, inasmuch as the Bank of Spain were under an obligation to meet their notes by providing gold or silver on presentation; but if a strict fulfilment of his obligations were insisted on, a borrower would not fulfil them by tendering notes—he must furnish gold or silver coin.

In Gibraltar pesetas, whether in the form of gold or silver or notes, were not currency at all, they were a commodity which could be bought or sold like any other commodity. Up to March, 1936, however, peseta notes were commonly given and accepted both in Spain and in Gibraltar as the equivalent in value of the coinage they represented.

By a Spanish decree of 1930 the export of silver from Spain was prohibited. Even before 1936 regulations had been made prohibiting the exportation of bank-notes in excess of 5000 pesetas, and on March 16, 1936, the Spanish Government, apparently perturbed by the fact that refugees leaving Spain were found to be taking with them a large number of peseta notes, enacted a further decree under which travellers were prohibited from exporting any notes of the Bank of Spain unless accompanied by an authorization called a "guia."

These "guias" were issued by the Customs authorities, who were required to send a daily report of the "guias" issued by them, stating the names of the travellers and amounts authorized. After the date of the decree it became illegal for notes to be reintroduced into Spain unless accompanied by " guias " corresponding in amount to the pesetas proposed to be brought in.

Once the external notes were wedded to an appropriate " guia," they could be reintroduced, and as they were exchangeable at the Bank of Spain for metal of their nominal amount, they were of the same value as the coinage they represented.

But there were a large number of peseta notes already in Gibraltar for which " guias " were not necessarily forthcoming. It is true that by art. 5 of the decree these peseta notes might be remitted to Spain within five days of the decree, but it is by no means clear that the owners would take advantage of this section, since the notes, once in Spain, could only be exported by permission of the Customs authorities, and in any case, owing to the prohibition of the export of silver, no silver could be taken out in their place.

In addition to these extraneous peseta notes, it appears that a large number of notes reached Gibraltar without any accompanying " guias," because many refugees were arriving from Spain bringing notes with them without obtaining " guias." The result was that there were in use in Gibraltar after the date of the decree, two types of notes—those accompanied by " guias," and those unaccompanied.

Precisely how the decree worked does not appear from the decree itself, and was not explained in evidence. Presumably any " guia " might be used for the reintroduction of the same number of peseta notes as it permitted to be exported, and it was not necessary that it should accompany the same notes which were exported under its authority; but, in their Lordships' view, it is not necessary to determine this point. Naturally, since the notes for which " guias " were supplied could be remitted to Spain and those for which " guias " were not supplied could not, the former had a higher value than the latter. But both continued to be used in Gibraltar.

In these circumstances, when the date for repaying the loan of 500,000 pesetas and the second half-year's interest was approaching, Mr. Pons saw Mr. Caston and told him that if payment was to be made with notes they should be accompanied with "guias." Presumably as a result of this conversation, Mr. Mackintosh wrote on May 16 to Mr. King offering to pay (*a*) by cheque on Madrid; (*b*) by bank-notes delivered in Gibraltar; or (*c*) equivalent sterling at 42 pesetas to the 1*l*. (42 pesetas to the £ being the rate of exchange for peseta notes without "guias"). At the same time Mr. Mackintosh suggested postponement of payment for two weeks.

In reply, Mr. King stated that a cheque on Barclays Bank in pesetas would be acceptable, but as it appears from the evidence that that bank dealt only in pesetas accompanied by "guias," Mr. King's suggestion was in the nature of a counter-offer.

On May 28 Mr. Caston called on Mr. Pons, and offered to pay the interest up to May 22 in notes without "guias." This offer was refused, and ultimately Mr. Caston paid 8750 pesetas in silver.

Later, on June 19, 1936, Mr. Prescott, a public notary, called on behalf of the appellants on Mr. Pons, paid the interest due up to that date in silver, and tendered a cheque on the Crédit Foncier for 500,000 pesetas. Mr. Mackintosh had in fact opened a credit with that bank for that sum by lodging with it 500,000 peseta notes obtained partly from an Indian money-changer and partly by purchases of small sums when he could get them at about an exchange of 42 to the £. Admittedly, the Crédit Foncier would not have supplied "guias" with these notes, and the payment was refused unless corresponding Government "guias" were also provided. On the same day, and after this refusal, the appellants informed the respondent by letter that they had notified the Crédit Foncier in Gibraltar to hold at her disposal the sum of 500,000 pesetas, and disclaimed liability for further interest.

Finally, on October 5, the respondent's solicitors wrote stating that they had refused payment by cheque on Madrid, or bank-notes delivered in Gibraltar, because such payment would not permit the respondent to deal with such sum, and had refused payment at the rate of 42 pesetas to the £ inasmuch as that rate of exchange was over and above the official rate.

The appellants thereupon, on October 16, tendered a bundle of 500,000 peseta notes without "guias." This tender was refused, and action was then brought, and the appellants by some means appear to have succeeded in lodging this bundle in Court. Presumably they intended by this means to make a payment into Court, but as pesetas are not currency in Gibraltar, their action was misconceived, and could have no effect upon the result of the case.

Both sides admitted before this Board that the contract was for the supply and return of pesetas in Gibraltar, and therefore for the supply and return of commodities and not of money, an admission which their Lordships consider to have been rightly made. The first question, therefore, which has to be determined, is what commodity the appellants contracted to tender to the respondent on May 22, 1936.

For the appellants it was argued that in Gibraltar pesetas meant peseta notes, that these notes were in regular use in Gibraltar at the time of the making of the contract, that though they were not legal tender in Gibraltar and might not be legal tender in Spain, yet they were treated as equivalent thereto, that peseta notes were in fact supplied in fulfilment of the contract by the respondent to the appellants, and that peseta notes were therefore all that the appellants were under an obligation to return.

For the respondent it was contended that the contract was for the supply of pesetas, that a credit on Barclays Bank was accepted in performance of that contract, that peseta notes were not supplied, and indeed, if it were material, that the appellants never operated the credit so as to receive peseta notes, but merely transferred to third parties, by means of cheques, the credit which had by cheque been transferred to them; that the appellants were, therefore, under an obligation to return pesetas, and that that obligation was not fulfilled by the tender of peseta notes.

In their Lordships' opinion, it is established by the evidence that the commodity agreed to be supplied was pesetas, and that the appellants accepted a credit upon Barclays Bank in fulfilment of that contract. It follows that, in their view, the appellants' contract was to return 500,000 pesetas in Gibraltar on the due date—namely, May 22, 1936.

What, then, is meant by such a contract? The word "peseta" means the unit of account in the currency of Spain. The appellants have contracted to supply 500,000 of such units, and their Lordships can find nothing in the contract between the parties to the present litigation to modify that meaning. The question can, therefore, be stated in another form by asking: What performance is required to fulfil an obligation to pay a foreign unit of account?

This question does not come before their Lordships devoid of authority. It has already been discussed in *In re Chesterman's Trusts. Mott* v. *Browning* (1), where the direct question came under consideration. It was there held by Russell J., now Lord Russell of Killowen, and by the Court of Appeal, that the obligation was to pay in whatever at the date of repayment was legal tender and legal currency in the foreign country whose money was lent.

This decision is not binding on their Lordships, but they think that it correctly enunciates the law applicable to the case. In their view, the appellants borrowed 500,000 units of account of the Republic of Spain, not 500,000 peseta notes; in performance of that contract they accepted a credit on Barclays Bank for 500,000 pesetas, and they were under contract to return 500,000 such units of account.

That contract is not fulfilled by the tender of 500,000 peseta notes—such notes are not units of account of the Spanish Republic. They were, it is true, frequently accepted in lieu of units of account, but the party to whom they were tendered was not obliged to accept them. To adapt the words of Warrington L.J. (as he then was) in *In re Chesterman's*

(1) [1923] 2 Ch. 466.

Trusts (1), the form in which such payment is to be made must be regulated by the municipal law of the country whose unit of account is in question, and what would or would not be a legal tender must depend upon the law on that subject in force at the time when the tender should have been made. If this were not so, their Lordships are unable to appreciate what principle is to be applied in ascertaining the nature of the commodity of which tender has to be made.

It is suggested that Russell J., as he then was, took a different view in *British Bank for Foreign Trade, Ld.* v. *Russian Commercial and Industrial Bank* (2), where he said (3): "(2.) . . . . The true position was that the loan was "repayable in any paper roubles issued by authority of the "Russian Government, and in use at the material date." And "(3.) It was argued that if the debt was to be paid outside "Russia it must be paid in gold roubles, because any paper "money was only legal tender in Russia, and not outside. "He did not agree with that view. The mortgagor was suing "to recover his securities and was entitled to do so if he "fulfilled his legal contract. If he made repayment in full "in the kind of money actually advanced to him—paper "roubles issued by authority of the Russian Government—it "did not matter whether that paper money was legal tender "in or out of Russia," and that his earlier view is to be preferred to the later one.

Their Lordships do not think that there is any conflict between the two cases. In their opinion, "in use at the "material date" means in use as legal tender. Moreover, the statement that "it did not matter whether the paper money "was legal tender in or out of Russia" was used in answer to the argument that the tender must be legal out of Russia as well as in Russia, and is a sufficient answer to that argument.

Some discussion took place before their Lordships as to whether in any case the appellants had fulfilled their contract in due time even if tender of notes of the Bank of Spain were

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(1) [1923] 2 Ch. 483.

(2) 38 Times L. R. 65.

(3) Ibid. 67.

J. C.
1938
PYRMONT, LD.
v.
SCHOTT.

a fulfilment of the contract. Having regard to the view which the Board takes, it is not necessary to determine this matter, nor is it material to consider what would have been the result if the respondent had furnished bank-notes and not a credit upon Barclays Bank in fulfilment of their part of the contract.

No dispute appears to arise as to the sum found to be due by the Chief Justice.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and that the appellants must pay the respondent's costs before the Board.

Solicitors for appellants : *Adler & Perowne.*
Solicitors for respondent : *William A. Crump & Son.*

[PRIVY COUNCIL.]

J. C.*
1938
Dec. 2.

CHUNG CHI CHEUNG . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE FULL COURT OF HONG KONG.

International Law—Foreign armed public ship—In British territorial waters—Vessel not a floating piece of foreign territory—Murder of captain on board by member of crew—Both British subjects—Accused arrested on shore—No diplomatic request for surrender by foreign government—Waiver of immunity—Jurisdiction of local British Court to try accused.

The appellant, a British subject, who was cabin boy on board a Chinese Maritime Customs cruiser—a foreign armed public ship—killed by shooting the captain of the vessel, also a British subject in the service of the Chinese Government, while the vessel was in the territorial waters of Hong Kong. Immediately after the shooting the acting chief officer, who had also been shot at and wounded by the appellant, ordered the vessel to proceed to Hong Kong, and on arrival there the Hong Kong police took the appellant to hospital. Extradition proceedings instituted by the Chinese authorities having failed on the ground that the appellant was a British national, he was at once re-arrested and charged with murder " in the waters of this colony." He was eventually convicted and sentenced to death, the acting chief officer and three of the crew of the Chinese cruiser having given evidence for the prosecution at the trial. On appeal by the appellant, alleging that the local British Court had no jurisdiction in the matter :—

Held, that a public armed ship in foreign territorial waters is not, and is not treated as, a floating part of the territory of her own nation. The immunities which, in accordance with the conventions of international law, are accorded to a foreign armed public ship and its crew and its contents do not depend upon an objective exterritoriality, but on an implication of the domestic law, and flow from a waiver by the local sovereign of his full territorial jurisdiction. Those immunities are conditional and can themselves be waived by the nation to which the public ship belongs. The Chinese Government, not in fact having made, as they could have done, a diplomatic request for the surrender of the appellant after the failure of the extradition proceedings, and having subsequently permitted members of their service to give evidence before the British Court in aid of the prosecution, plainly consented to the British Court exercising jurisdiction, and such jurisdiction was therefore validly exercised.

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* *Present:* LORD ATKIN, LORD MACMILLAN, LORD PORTER, SIR LANCELOT SANDERSON, and SIR GEORGE RANKIN.

J. C.
1938
CHUNG CHI CHEUNG
v.
THE KING.

Schooner Exchange v. *M'Faddon and Others* (1812) 7 Cranch, 116 referred to.

Judgment of the Full Court of Hong Kong (1937) 29 H. K. L. R. 22 affirmed.

APPEAL (No. 26 of 1938), by special leave in forma pauperis, from a judgment of the Full Court of Hong Kong (September 15, 1937), which had dismissed an appeal by the appellant, Chung Chi Cheung, from the conviction and sentence of death passed on him at the Ordinary Criminal Sessions of the Supreme Court of Hong Kong at Victoria (August 24, 1937) for the murder of one Douglas Lorne Campbell.

The appellant, a British subject, was cabin boy on board the Chinese Maritime Customs cruiser *Cheung Keng*—a foreign armed public ship. On January 11, 1937, when the vessel was in the territorial waters of Hong Kong, he shot and killed the captain of the vessel, D. L. Campbell, also a British subject in the service of the Chinese Government. The appellant also shot at and wounded the acting chief officer, and then shot and wounded himself. The acting chief officer, as soon as he was wounded, ordered the vessel to proceed to Hong Kong to obtain, as he said, the help of the Hong Kong police in arresting the appellant. On arrival at Hong Kong the police took the appellant to hospital, and took possession of the two revolvers with which he had armed himself, and of the spent bullets and the expended shells and unexpended cartridges. On February 25, 1937, extradition proceedings were begun against the appellant on the requisition of the chairman of the Provincial Government of Kwangtung, but those proceedings failed because the appellant was found to be a British national, and he was discharged. The appellant was at once rearrested, however, and charged with murder "in the waters of this Colony," and was eventually tried and, as stated, convicted and sentenced to death. At the trial four persons in the service of the Chinese Government gave evidence before the British Court in aid of the prosecution.

The Full Court of Hong Kong (MacGregor C.J., Alabaster and Lindsell JJ.) were of opinion that the universally conceded immunity to foreign warships when within the territorial waters of the host State was not based on the doctrine of exterritoriality, but was a freely accorded waiver by one sovereign State of part of its complete sovereignty; and that there could be waiver of immunity by the visiting State. They further held (inter alia) that from the fact that the Chinese Government, after the failure of their extradition proceedings, had made no diplomatic representations with a view to having the appellant put back on board the vessel, it was a reasonable and proper inference that the immunity enjoyed by members of the crew of the vessel had been willingly waived, and that therefore there was no bar to the exercise of its jurisdiction by the Supreme Court. The appeal is reported at (1937) 29 H. K. L. R. 22.

The question in this appeal was whether in these circumstances the local British Court had jurisdiction to try the appellant.

1938. Oct. 17, 18. *H. J. Wallington K.C.* and *Eric V. E. White* for the appellant. The ship in question was the public property of the Government of China, and entitled to such immunity as is conceded in such a case by international law. It is common ground that, unless the right to immunity was waived in respect of the appellant by some competent authority, the local Court at Hong Kong could not have had jurisdiction. It is alleged by the Crown that there was concurrent jurisdiction, but waiver would have to occur in that case as well. It is also common ground that the waiver relied upon by the Crown rests solely on the conduct of the acting chief officer of the vessel, who was in command because the appellant had killed the captain. The case for the Crown appears to be that the acting chief officer, being in command of the vessel, was competent to waive the right to immunity, and that, by his conduct in directing the vessel to proceed to Hong Kong, he surrendered the appellant to the jurisdiction of the local Court. It is not suggested by the Crown that the acting chief officer waived immunity as to the ship, but only as to the appellant. The case for the appellant is that in the circumstances no right of personal immunity of the appellant arose.

If immunity did arise, it existed as to the vessel and the crew, and it was an immunity from arrest and other matters of that sort by reason of the fact that it was the public property of the State owning it, and engaged on the business of that State. If any question of personal immunity is relevant in this case, then it is submitted that there was in fact no waiver of immunity, and, indeed, that the acting chief officer would not be competent because he would have no authority entitling him to waive personal immunity. On no ground can it be said that there was local jurisdiction. The ship was part of the territory of China. Assuming that that is wrong, then it is submitted that it was the public property of the Chinese Government and was free of all local jurisdiction, either as to the ship or anything on it, or as to the crew. The ship could not be invaded for the purposes of arrest.

Assuming that the crime was committed on Chinese territory, then, to give jurisdiction to any British Court, regard must be had to the Treaty of Tien-tsin of 1858, which is relied upon by the Crown, and also to the China Order in Council of 1925 (No. 603), prescribing the manner in which the jurisdiction conferred by art. 16 of the treaty is to be exercised. By that article: "British subjects who may commit any crime in "China shall be tried and punished by the Consul, or other "public functionary authorized thereto, according to the laws "of Great Britain." That article, it is submitted, points exclusively to the Consular Courts which were set up to deal with British subjects in China. It is not a universal surrender. Assuming that there was here any right of personal immunity, then it was essential that somebody should do some act which effectively waived it, and on the evidence there has been no such act. [Reference was made to *Schooner Exchange* v. *M'Faddon and Others* (1); *The Parlement Belge* (2); Dicey's Conflict of Laws, 5th ed., p. 54, para. 8; Wheaton's International Law, 6th ed., vol. i., pp. 239, 247–8; Oppenheim's International Law, 5th ed., vol. i., p. 357, para. 172; p. 666, para. 450; Lawrence's Principles of International Law, 7th ed., pp. 227–8;

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(1) 7 Cranch, 116.

(2) (1880) 5 P. D. 197.

Hall's International Law, 8th ed., p. 245, para. 55; Pitt Cobbett's Leading Cases on International Law, 5th ed., vol. i., p. 260; and *Compania Naviera Vascongado* v. *SS. Cristina*. (1)]

This case must be decided on one of two grounds: either that the crime was committed on Chinese territory, and, therefore, unless the treaty gives jurisdiction to the local Court, there can be none; or, secondly, it must be decided on the footing that the ship being entitled to immunity includes the crew. If the right to immunity of the ship includes the immunity of the crew, it would require much more than what the acting chief officer did to waive the immunity of the ship in any such case as this. If the right were one to personal immunity, which it is submitted it was not, it is stated in Phillimore's International Law, 3rd ed., vol. ii., p. 188, para. 143, that even an Ambassador cannot waive the right without his Sovereign's consent. It was not within the authority of the acting chief officer in this case, acting suddenly and in an emergency, to do an act which would have such grave consequences.

Eric V. E. White followed.

Sir Donald Somervell A.-G. and *Kenelm Preedy* for the Crown. Two questions arise on the main matter: first, the general question whether a foreign warship in the territorial waters is to be regarded for all purposes as a floating piece of territory; it is submitted that that is the wrong view. Secondly, whether the right view is that the territorial jurisdiction of the host country remains subject to this, that by allowing the foreign warship to enter, it impliedly undertakes not to exercise that jurisdiction in relation to matters which occur on that ship. If that broad proposition be right, then it is clear that where the visiting ship agrees to the Courts of the host State exercising jurisdiction in respect of offences committed within territorial waters, those Courts have jurisdiction. [Reference was made to a number of extracts from the Memorandum of Lord Chief Justice Cockburn in the Report of the Royal Commission on Fugitive Slaves, 1876, Cd. 1516; to Hall's International Law, 8th ed., p. 218, where there is a caveat against the doctrine of exterritoriality being taken too far; and to Oppenheim's International Law, 5th ed., vol. i., p. 623, note 2.]

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(1) [1938] A. C. 485.

The right view may be that if an offence is actually committed on board the visiting ship, whether by a national of the host country or not, if the Sovereign, through the commander of the vessel, asserts his jurisdiction, then the Courts of the host country would not interfere. This vessel not being a floating piece of China, the territorial jurisdiction of Hong Kong was exercisable in respect of the crime committed unless the Chinese Government, through the proper authority, claimed to exercise jurisdiction under the principle admittedly applicable to ships of war in foreign waters. The question of the jurisdiction of the local Courts in criminal matters does not arise normally until the offender has by some means or other come within the jurisdiction. The crime in this case was committed by a British subject against a British subject within the waters of the Colony of Hong Kong, and in those circumstances the local Court had jurisdiction to try the appellant on his being landed at Hong Kong. The immunity accorded to public vessels from the exercise of jurisdiction over them when within the waters of the receiving State is based upon the consent of the receiving State to waive the exercise of that complete, exclusive territorial jurisdiction which it possesses, and the immunity thus accorded can be itself, and was in the circumstances of this case, waived by the visiting State.

With regard to art. 16 of the Treaty of Tien-tsin, 1858, that article is in very wide and unqualified terms, and there are no exceptions to it. By it China renounced jurisdiction over offences committed by British subjects within her territory.

H. J. Wallington K.C. replied.

Dec. 2. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from the judgment of the Full Court of Hong Kong dismissing an appeal by the appellant from his conviction and sentence at a trial in the Supreme Court of Hong Kong before the Chief Justice, MacGregor C.J., and a jury. The appellant was convicted of the murder of

Douglas Lorne Campbell, and was sentenced to death. The murder was committed on board the Chinese Maritime Customs cruiser *Cheung Keng* while that vessel was in Hong Kong territorial waters. Both the murdered man and the appellant were in the service of the Chinese Government as members of the officers and crew of the cruiser. The former was captain ; the appellant was cabin boy. Both were British nationals. At the trial the point was taken that, as the murder took place on an armed public vessel of the foreign Government, the British Court had no jurisdiction in the matter. The contention was overruled by the Chief Justice at the trial, and on appeal his decision was upheld by the Full Court, over which he presided.

In order to elucidate the legal position it will be necessary to make a short statement of the material facts. On January 11, 1937, the accused shot and killed the captain. He then went up the ladder to the bridge and shot at, and wounded, the acting chief officer, and then went below and shot and wounded himself. The acting chief officer, as soon as he was wounded, directed the boatswain to proceed to Hong Kong at full speed and hail the police launch. He wanted, he said, help to arrest the accused from the Hong Kong police. Within a couple of hours the launch of the Hong Kong water police came alongside in answer to the cruiser's signal. The police took the wounded officer and the accused to hospital. They took possession of the two revolvers with which the accused had armed himself, of the spent revolver bullets and expended shells, and of some unexpended cartridges. On February 25 extradition proceedings were commenced against the accused on the requisition of the chairman of the Provincial Government of Kwangtung, alleging murder and attempted murder on board the Chinese Customs cruiser "within the jurisdiction of "China while the said cruiser was approximately one mile off "Futaumun (British waters)." This appears to be an allegation that the vessel had not at the time reached British territorial waters. The fact that the crime was in reality committed within British waters is not now in dispute. After many adjournments the magistrate decided, on evidence called for the defence, that the accused was a British national, and that the proceedings therefore failed. The accused was at once rearrested and charged with murder "in the waters of this "colony," and duly committed. At the hearing before the magistrate, and at the trial, the acting chief officer and three of the crew of the Chinese cruiser were called as witnesses for the prosecution. Police witnesses produced, and gave evidence as to, the revolvers, cartridge cases and bullets. As has already been stated, the accused was convicted and sentenced to death.

On the question of jurisdiction two theories have found favour with persons professing a knowledge of the principles of international law. One is that a public ship of a nation for all purposes either is, or is to be treated by other nations as, part of the territory of the nation to which she belongs. By this conception will be guided the domestic law of any country in whose territorial waters the ship finds herself. There will therefore be no jurisdiction in fact in any Court where jurisdiction depends upon the act in question, or the party to the proceedings, being done or found or resident in the local territory. The other theory is that a public ship in foreign waters is not, and is not treated as, territory of her own nation. The domestic Courts, in accordance with principles of international law, will accord to the ship and its crew and its contents certain immunities, some of which are well settled, though others are in dispute. In this view, the immunities do not depend upon an objective exterritoriality, but on implication of the domestic law. They are conditional, and can in any case be waived by the nation to which the public ship belongs.

Their Lordships entertain no doubt that the latter is the correct conclusion. It more accurately and logically represents the agreements of nations which constitute international law, and alone is consistent with the paramount necessity, expressed in general terms, for each nation to protect itself from internal disorder by trying and punishing offenders within its boundaries. It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, then, are the immunities of public ships of other nations accepted by our Courts, and on what principle are they based ?

The principle was expounded by that great jurist Chief Justice Marshall in *Schooner Exchange* v. *M'Faddon* (1), a judgment which has illumined the jurisprudence of the world (2): "The jurisdiction of Courts is a branch of that which is possessed "by the nation as an independent sovereign power. The "jurisdiction of the nation within its own territory is neces-"sarily exclusive and absolute. It is susceptible of no limita-"tion not imposed by itself. . . . . All exceptions, therefore, to "the full and complete power of a nation within its own "territories, must be traced up to the consent of the nation "itself. They can flow from no other legitimate source. "This consent may be either express or implied. In the latter "case, it is less determinate, exposed more to the uncertainties "of construction ; but, if understood, not less obligatory. "The world being composed of distinct sovereignties, possessing "equal rights and equal independence, whose mutual benefit "is promoted by intercourse with each other, and by an "interchange of those good offices which humanity dictates and "its wants require, all sovereigns have consented to a relaxation "in practice, in cases under certain peculiar circumstances, of "that absolute and complete jurisdiction within their respective "territories which sovereignty confers. . . . .

"This perfect equality and absolute independence of "sovereigns, and this common interest impelling them to "mutual intercourse, and an interchange of good offices with "each other, have given rise to a class of cases in which every

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(1) 7 Cranch, 116.

(2) Ibid. 136–7.

J. C.
1938
CHUNG CHI CHEUNG
v.
THE KING.

"sovereign is understood to waive the exercise of a part of that "complete exclusive territorial jurisdiction, which has been "stated to be the attribute of every nation."

The Chief Justice then proceeds to illustrate the class of cases to which he has referred. He takes first (1) "the exemp-"tion of the person of the sovereign from arrest or detention "within a foreign territory." Secondly (2) "standing on the "same principles with the first, is the immunity which all "civilised nations allow to foreign ministers." He said (2): "Whatever may be the principle on which this immunity is "established, whether we consider him as in the place of the "sovereign he represents, or by a political fiction suppose him "to be extraterritorial, and, therefore, in point of law, not "within the jurisdiction of the sovereign at whose court he "resides; still the immunity itself is granted by the governing "power of the nation to which the minister is deputed. This "fiction of exterritoriality could not be erected and supported "against the will of the sovereign of the territory. He is "supposed to assent to it."

The judgment then proceeds to the third case (3) "in which a "sovereign is understood to cede a portion of his territorial "jurisdiction," namely, "where he allows the troops of a "foreign prince to pass through his dominions." The Chief Justice lays down that (4) "The grant of a free passage "therefore implies a waiver of all jurisdiction over the troops "during their passage, and permits the foreign general to use "that discipline, and to inflict those punishments which the "government of his army may require." He points out that, differing from the case of armed troops, where an express license to enter foreign territory would not be presumed, the private and public vessels of a friendly power have an implied permission to enter the ports of their neighbours unless and until permission is expressly withdrawn. When in foreign waters private vessels are subject to the territorial jurisdiction (5): "But in "all respects different is the situation of a public armed ship.

(1) 7 Cranch, 137.
(2) Ibid. 138.
(3) Ibid. 139.
(4) Ibid. 116, 140.
(5) Ibid. 144–5.

J. C.
1938
Chung Chi Cheung v. The King.

"She constitutes a part of the military force of her nation; "acts under the immediate and direct command of the "sovereign; is employed by him in national objects. He has "many and powerful motives for preventing those objects "from being defeated by the interference of a foreign state. "Such interference cannot take place without affecting his "power and his dignity. The implied license therefore under "which such vessel enters a friendly port, may reasonably be "construed, and it seems to the Court, ought to be construed, "as containing an exemption from the jurisdiction of the "sovereign, within whose territory she claims the rites of "hospitality. . . . It seems then to the Court, to be a principle "of public law, that national ships of war, entering the port of "a friendly power open for their reception, are to be considered "as exempted by the consent of that power from its jurisdiction."

This conclusion is based on the principles expounded in the extracts from which the Chief Justice summarized (1): "The "preceding reasoning, has maintained the propositions that "all exemptions from territorial jurisdiction, must be derived "from the consent of the sovereign of the territory; that this "consent may be implied or expressed; and that when implied, "its extent must be regulated by the nature of the case, and "the views under which the parties requiring and conceding "it must be supposed to act."

The judgment then proceeded to apply the principles stated to the case before the Court, and held that the former owners of the *Exchange*, which had been captured by the French and entered the port of Philadelphia under stress of weather, could not have a decree to recover the vessel, which must be treated as an armed public vessel of the Emperor of the French, whose title could not be controverted in the American Court.

The extreme doctrine of exterritoriality was not in issue in *Schooner Exchange* v. *M'Faddon* (1), and neither the principles enunciated by Marshall C.J., nor his application of them, appears to support it. In this country the question arose in acute form in 1875 over instructions issued by the Admiralty to commanders of Her Majesty's ships in respect of the treatment of fugitive slaves. They were attacked by Sir William Vernon Harcourt, then Whewell Professor of International Law at Cambridge and Liberal M.P. for Oxford, in two letters to The Times under the title "Historicus." He there stated, November 4, 1875, that he had seen "with much surprise that "the doctrine of the absolute immunity of a public ship, and "all persons and things on board of it, from local jurisdiction "and the operation of the local law when lying in the territorial "waters . . . . has been treated as a doubtful proposition. I "had certainly supposed that in the whole range of public "law there was no position more firmly established by "authority, more universally admitted by Governments, or "one which had been more completely accepted in the intercourse of States as unquestioned and unquestionable."

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(1) 7 Cranch, 116, 143.

The Government appointed a Royal Commission (1) to report on the whole question as to the reception of fugitive slaves, which included such eminent lawyers as Sir Alexander Cockburn C.J., Sir Robert Phillimore, Mr. Mountague Bernard, Mr. Justice Archibald, Mr. Alfred Thesiger K.C., Sir Henry Maine, Mr. James Fitzjames Stephen K.C., and Mr. Henry C. Rothery, the Registrar in Admiralty. The lawyers were not agreed as to the doctrine of international law, and the Commission were able to report without expressing any decided opinion about it. The lawyers, however, wrote memoranda which were annexed to the report. Sir Robert Phillimore, Mr. Bernard and Sir Henry Maine appeared to favour the more extreme doctrine, but admitted it must have qualifications. Sir Alexander Cockburn, in a memorandum (2) which is worthy to be compared with the judgment of Marshall C.J., discussed the whole question of exterritoriality of a public ship of war, quoting the authorities from 1740 onwards, and referring to cases of Government action. He quotes Casaregis (1740), Discursus de Commercio; Hübner (1759), De la Saisie des Bâtiments Neutres; Lampredi; Pinheiro-Ferreira; Azuni; Lord Stowell's advice to the British Government in 1820 in *Brown's* case; Wheaton; Hautefeuille, Des Droits et des Devoirs des Nations Neutres; Ortolan, Diplomatie de la Mer;

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(1) 1876 Cd. 1516.

(2) Ibid. xxviii.

Bluntschli; Heffter; and Calvo. Of these Hübner, Hautefeuille, Ortolan and Calvo support in his view the high doctrine of exterritoriality, Casaregis and Wheaton are non-committal, the others are against the doctrine. After controverting the views which favour complete exterritoriality, and pointing out the difficulties and, indeed, absurdities, to which the doctrine leads, he says (1): "The rule which reason and good sense "would, as it strikes me, prescribe, would be that, as regards "the discipline of a foreign ship, and offences committed on "board as between members of her crew towards one another, "matters should be left entirely to the law of the ship, and that "should the offender escape to the shore, he should, if taken, "be given up to the commander of the ship on demand, and "should be tried on shore only if no such demand be made. "But if a crime be committed on board the ship upon a local "subject, or if, a crime having been committed on shore, the "criminal gets on board a foreign ship, he should be given up "to the local authorities. In which way the rule should be "settled, so important a principle of international law ought "not to be permitted to remain in its present unsettled state."

In this passage, which was cited with approval by the Full Court of Hong Kong in the present case, it should be observed that the Lord Chief Justice assumes that even if a crime be committed on board by one member of the crew on another, should the offender escape to shore and no demand be made for his return, the territorial Court would have jurisdiction. Their Lordships doubt whether, when he is dealing with the case of a crime committed on board on a local subject, he has present to his mind the possibility of the local subject being a member of the crew. And while he says that in the cases put the offender should be given up to the local authorities, he does not say whether, if surrender were refused, judicial process could be directed to the captain of the foreign vessel to secure the custody of the offender by the local authority. In the memorandum of Sir Alexander Cockburn, Mr. Justice Archibald concurred. Mr. Stephen wrote a memorandum to the same effect in the trenchant Stephen style. Mr. Rothery treated

(1) 1876, Cd. xlii.

the dogmatic assertion of "Historicus" and his authorities to a merciless dissection to which the conclusions of a Whewell Professor can seldom have been subjected. In addition to the authorities already mentioned, reference should be made to the passages cited in the judgment of the Supreme Court in this case from Hall's International Law, 8th ed., 1924, edited by Professor Pearce Higgins, para. 55. There the author states that a public vessel is exempt from the territorial jurisdiction; but that her crew and persons on board of her cannot ignore the laws of the country in which she is lying as if she were a territorial enclave. Exceptions to their obligation exist in the case of acts beginning and ending on board the ship, and taking no effect externally to her, in all matters in which the economy of the ship, or the relations of persons on board to each other, are exclusively concerned. The author appends a note (1): "The case which, however, would be extremely rare on board "a ship of war, of a crime committed by a subject of the state "within which the vessel is lying against a fellow subject, "would no doubt be an exception to this. It would be the "duty of the captain to surrender the criminal."

The other passage is from Oppenheim's International Law, 5th ed., 1937, edited by Professor Lauterpacht, vol. i., para. 450. The author adopts the full exterritorial view: "The position "of men-of-war in foreign waters is characterised by the fact "that they are called 'floating portions of the flag-State.' For "at the present time there is a customary rule of international "law, universally recognised, that the State owning the waters "into which foreign men-of-war enter must treat them in every "point as though they were floating portions of their flag-State." When, however, he is dealing with the analogous immunities of diplomatic envoys, para. 389, he says "exterritoriality, in "this as in every other case, is a fiction only, for diplomatic "envoys are in reality not without, but within, the territories of "the receiving States." There is a note (2) that "The modern "tendency among writers is towards rejecting the fiction of "exterritoriality," a note which is not in the 2nd edition, the last prepared by the author, and appears for the first

(1) Note 2, p. 245.

(2) Note 3, p. 620.

time in the 4th edition, edited by Professor McNair.

Their Lordships have no hesitation in rejecting the doctrine of exterritoriality expressed in the words of Mr. Oppenheim, which regards the public ship "as a floating portion of the "flag-State." However the doctrine of exterritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore. Immunities may well be given in respect of the conduct of members of the crew to one another on board ship. If one member of the crew assault another on board, it would be universally agreed that the local Courts would not seek to exercise jurisdiction, and would decline it unless, indeed, they were invited to exercise it by competent authority of the flag-nation. But if a resident in the receiving State visited the public ship and committed theft, and returned to shore, is it conceivable that, when he was arrested on shore, and shore witnesses were necessary to prove dealings with the stolen goods and identify the offender, the local Courts would have no jurisdiction ? What is the captain of the public ship to do ? Can he claim to have the local national surrendered to him ? He would have no claim to the witnesses, or to compel their testimony in advance, or otherwise. He naturally would leave the case to the local Courts. But on this hypothesis the crime has been committed on a portion of foreign territory. The local Court then has no jurisdiction, and this fiction dismisses the offender untried and untriable. For it is a commonplace that a foreign country cannot give territorial jurisdiction by consent. Similarly, in the analogous case of an embassy. Is it possible that the doctrines of international law are so rigid that a local burglar who has broken and entered a foreign embassy and, having completed his crime, is arrested in his own country, cannot be tried in the Courts of the country ? It is only necessary to test the proposition to assume that the foreign country has assented to the jurisdiction of the local

Courts. Even so, objective exterritoriality would, for the reason given above, deprive our Courts at any rate of any jurisdiction in such a case. The result of any such doctrine would be not to promote the power and dignity of the foreign sovereign, but to lower them by allowing injuries committed in his public ships or embassies to go unpunished.

On this topic, their Lordships agree with the remarks made by Professor Brierly in The Law of Nations (1928), p. 110: "The term 'exterritoriality' is commonly used to "describe the status of a person or thing physically present "in a State's territory, but wholly or partly withdrawn from "that State's jurisdiction by a rule of international law, "but for many reasons it is an objectionable term. It "introduces a fiction, for the person or thing is in fact within, "and not outside, the territory: it implies that jurisdiction "and territory always coincide, whereas they do so only "generally; and it is misleading because we are tempted to "forget that it is only a metaphor, and to deduce untrue legal "consequences from it as though it were a literal truth. At "most it means nothing more than that a person or thing has "some immunity from the local jurisdiction; it does not help "us to determine the only important question, namely, how "far this immunity extends."

The true view is that, in accordance with the conventions of international law, the territorial sovereign grants to foreign sovereigns and their envoys, and public ships and the naval forces carried by such ships, certain immunities. Some are well settled; others are uncertain. When the local Court is faced with a case where such immunities come into question, it has to decide whether in the particular case the immunity exists or not. If it is clear that it does, the Court will of its own initiative give effect to it. The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process. These immunities are well settled. In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local Courts would not exercise jurisdiction. The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction. What are the precise limits of the immunities it is not necessary to consider. Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offences on land. It is not necessary for their Lordships to consider these. In the present case, the question arises as to the murder of one officer, and the attempted murder of another, by a member of the crew. If nothing more arose, the Chinese Government could clearly have had jurisdiction over the offence ; and, though the offender had, for reasons of humanity, been taken to a local hospital, a diplomatic request for his surrender would appear to have been in order. It is difficult to see why the fact that either the victim or the offender, or both, are local nationals, should make a difference if both are members of the crew. But this request was never made. The only request was for extradition, which is based upon treaty and statutory rights, and in the circumstances inevitably failed. But if the principles which their Lordships have been discussing are accepted, the immunities which the local Courts recognize flow from a waiver by the local sovereign of his full territorial jurisdiction, and can themselves be waived. The strongest instances of such waiver are the not infrequent cases where a sovereign has, as it is said, submitted to the jurisdiction of a foreign Court over his rights of property. Here is no question of saying you may treat an offence committed on my territory as committed on yours. Such a statement by a foreign sovereign would count for nothing in our jurisprudence. But a sovereign may say, you have waived your jurisdiction in certain cases, but I prefer in this case that you should exercise it. The original jurisdiction in such a case flows afresh.

Applying these considerations to the present case, it appears to their Lordships as plain as possible that the Chinese Government, once the extradition proceedings were out of the way, consented to the British Court exercising jurisdiction. It is

J. C.
1938
CHUNG CHI CHEUNG
v.
THE KING.

not only that with full knowledge of the proceedings they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British Court in aid of the prosecution. That they had originally called in the police might not be material if, on consideration, they decided to claim jurisdiction themselves. But the circumstances stated, together with the fact that the material instruments of conviction, the revolver bullets, etc., were left without demur in the hands of the Hong Kong police, make it plain that the British Court acted with the full consent of the Chinese Government. It therefore follows that there was no valid objection to the jurisdiction, and the appeal fails. There was a further point raised by the Crown as to the possible effect of the Treaty of Tien-tsin in 1858, in renouncing jurisdiction by Chinese over British subjects who committed crimes in China. The Supreme Court was prepared to decide in favour of the Crown on this point also, but, in view of the opinion already expressed on the main point, it is unnecessary to decide this, and no opinion is expressed upon it. For the above reasons their Lordships will humbly advise His Majesty that this appeal be dismissed.

Solicitors for appellant : *Reid Sharman & Co.*
Solicitors for respondent : *Burchells.*

[HOUSE OF LORDS.]

H. L. (E.)*
1938
June 20, 21, 23, 24, 28, 29; Nov. 17.

CAXTON PUBLISHING COMPANY, LIMITED . . . . APPELLANTS;

AND

SUTHERLAND PUBLISHING COMPANY RESPONDENTS.

Copyright—Damages—Act of conversion—Limitation of time for commencement of action—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 6, 7, 10, 35.

Sect. 6, sub-s. 1, of the Copyright Act, 1911, provides that "Where copyright in any work has been infringed, the owner of "the copyright shall, except as otherwise provided by this Act, "be entitled to all such remedies by way of injunction or inter- "dict, damages, accounts, and otherwise, as are or may be "conferred by law for the infringement of a right."

Sect. 7: "All infringing copies of any work in which copyright "subsists, or of any substantial part thereof, and all plates used ". . . . for the production of such infringing copies, shall be "deemed to be the property of the owner of the copyright, who "accordingly may take proceedings for the recovery of the "possession thereof or in respect of the conversion thereof."

Sect. 10: "An action in respect of infringement of copyright "shall not be commenced after the expiration of three years "next after the infringement":—

Held, (1.) that the remedies given by s. 6 and s. 7 respectively are cumulative and not alternative;

(2.) that the limitation of three years provided by s. 10 applies both to proceedings under s. 6 for infringement of copyright and to proceedings under s. 7 for conversion;

(3.) that the act of binding together the infringing sheets with the innocent sheets so as to form the volume produced by the appellants constituted the act of conversion in respect of which the respondents were entitled to damages;

(4.) that the value of the sheets converted was not to be measured by the mere cost of printing them, but that the Court was entitled, and bound, to take into account, among other circumstances, the fact that they were to be inserted in a volume, and that the value might properly be calculated by taking a proportion of the value of such volume.

Sect. 14 of the Copyright Act, 1911, is, by its terms, made a substantive part of the Customs Consolidation Act, 1876, and a contravention of s. 14 constitutes a contravention of the Act of 1876 and not "a contravention of the provisions of this Act" within the meaning of the definition in s. 35 of the Copyright Act, 1911.

Decision of the Court of Appeal [1936] Ch. 323 affirmed.

Decision of the Court of Appeal [1938] Ch. 174 reversed.

* *Present:* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ROCHE, and LORD PORTER.

H. L. (E.)
1938
CAXTON PUBLISHING Co. v. SUTHERLAND PUBLISHING Co.

CONSOLIDATED APPEALS from the Court of Appeal.

The plaintiffs, the Sutherland Publishing Co., claimed an injunction to restrain the defendants, the Caxton Publishing Co., Ld., from infringing the plaintiffs' copyright in a literary work entitled "Heating and Ventilating," and an inquiry as to the damages suffered by the plaintiffs by reason of the infringement and conversion by the defendants' publication of a book entitled "Modern Practical Plumber," containing extracts from "Heating and Ventilating."

The defendants admitted the infringement alleged and submitted to an injunction and inquiry as to damages suffered by the plaintiffs by the infringement, or, alternatively, for the conversion of parts of the plaintiffs' work, but not for both. Two points of law arose upon this defence: (*a*) whether the plaintiffs were entitled to recover both damages for infringement under s. 6 of the Copyright Act, 1911, and also damages for conversion under s. 7 of the Act; and (*b*) whether s. 10 of that Act imposing a limit of time for an action to three years after infringement applied to a claim for damages for conversion.

The action, so far as concerned these points of law, was heard by Farwell J., who decided the first question in the negative and did not deal with the second question; but his decision was reversed by the Court of Appeal (1), the latter Court holding that damages under s. 6 and s. 7 of the Copyright Act, 1911, were cumulative and not alternative, but did not decide the second question.

The question as to damages was subsequently dealt with by Crossman J. (2), who held (*a*) that the expression "an action "in respect of infringement of copyright" was wide enough to cover the claim for damages for conversion; (*b*) that the time ran from the infringement, that the infringement was the printing the infringing copies, and that the claim for damages was limited to copies printed within three years before the issue of the writ; and (*c*) that the conversion at the date of which the value of the infringing copies must be assessed was the order given by the Caxton Co. to the binders to bind the unbound sheets containing the infringing matter into their bound copies of their book. On appeal, the Court of Appeal held (*a*) (Sir Wilfrid Greene M.R. and Romer L.J. (MacKinnon L.J. dissenting)) (1) that the limitation of three years did not apply to an action for damages for conversion under s. 7 of the Copyright Act, 1911, but that the limitation applicable was six years under the Limitation Act, 1623; and (*b*) (by the whole Court) that the act of conversion as at the date of which the value of the infringing copies ought to be ascertained was the delivery by the Caxton Co. of the bound copies to their purchasers.

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(1) [1936] Ch. 323.

(2) [1937] Ch. 294.

The Caxton Co. appealed.

Hon. Sir Stafford Cripps K.C., E. J. Macgillivray and *G. Granville Slack* for the appellants. In the first appeal the question is, whether the respondents are entitled to recover in respect of the same matter damages for infringement of copyright and also damages for conversion; that is, whether these remedies are alternative or cumulative? That depends upon the true construction of s. 6 and s. 7 of the Copyright Act, 1911. We submit that the remedies are clearly alternative and not cumulative. If it were otherwise, the plaintiff in many cases might recover double damages, a result certainly not contemplated by the framers of the Act. No statute should be read as giving a double remedy for one wrong unless express words are used clearly showing that intention. In *Neilson* v. *Betts* (2), a patent case, Lord Westbury said: "I have only further to observe that the decree of the Court "below directed not only an inquiry as to damages, but also "an account of profits. The two things are hardly reconcilable, "for if you take an account of profits you condone the infringe-"ment. I therefore think, my Lords, that we were right in "calling upon the respondent's counsel to elect between the "two which he would adopt." We therefore contend that the respondents were not entitled to pursue both remedies.

Secondly, on the question of limitation, s. 10 of the Copyright Act, 1911, which provides that an action in respect of infringement shall not be commenced after the expiration of three

(1) [1938] Ch. 174.

(2) (1871) L. R. 5 H. L. 1, 22.

years, is the relevant enactment. On this point Crossman J. decided in our favour, namely, that in respect of infringement and conversion the limitation was three years; but the Court of Appeal held that section inapplicable to conversion, and that for it the limitation of time was six years under the Limitation Act, 1623, taking the view that s. 10 is confined to claims in respect of infringement. We submit that the language of that section is apt and sufficiently wide to cover the case of conversion. Any other view would lead to this strange result, that in England the period of limitation would be six years, while in Scotland it would be forty years. That cannot have been intended. Three years, we say, is the period of limitation both for infringement and conversion. Sect. 14, upon which reliance was placed in the Court of Appeal, cannot be treated as part of the Copyright Act in view of the provisions it contains that they are to have effect " as if they were part of the "Customs Consolidation Act, 1876." [The Canadian case of *Massie & Renwick* v. *Underwriters Survey Bureau* (1) was cited.]

Thirdly, the question is, what is the act of conversion from which the statute runs and what is the chattel converted? Conversion was defined by Atkin J. in *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll* (2) thus: " It appears to me plain "that dealing with goods in a manner inconsistent with the "right of the true owner amounts to a conversion, provided "that it is also established that there is also an intention on the "part of the defendant in so doing to deny the owner's right "or to assert a right which is inconsistent with the owner's "right." On that definition, which was approved by Scrutton L.J. in *Oakley* v. *Lyster* (3), the question is whether the respondents' property was dealt with in a manner inconsistent with their rights. On this point we are content to take the date when the infringing sheets were bound up in the appellants' book.

Fourthly, what is the correct basis for assessing the damages? There being no fraud or bad faith, the true measure is what the respondents have actually lost by the conversion. The net and not the gross value must be taken. *Ash* v. *Dickie* (1), in which it was held that for the infringement of a book by a series of articles in a newspaper the basis on which damages should be assessed was to take the sale price as the value of each copy of the paper and then estimating the proportion of the total value of the infringing copies as so ascertained which should be attributed to the infringing articles, was wrongly decided and should be overruled. In *Brierly* v. *Kendall* (2) the measure of damage was held to be the value of the plaintiffs' interest in the goods at the time of the trespass. In *Johnson* v. *Stear* (3) it was said that the proper measure was the real loss. In *Chinery* v. *Viall* (4) Bramwell B. said that the plaintiff was entitled to no more than the real damage sustained; and in *Livingstone* v. *Rawyards Coal Co.* (5) Lord Cairns said that the question was what was the value of the thing to the person from whom it was taken. *Trotter* v. *Maclean* (6) and *Peruvian Guano Co., Ld.* v. *Dreyfus Brothers & Co.* (7) were also cited.

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(1) (1937) S. C. R. 265.
(2) (1918) 88 L. J. (K. B.) 601, 605.
(3) [1931] 1 K. B. 148, 153.

K. E. Shelley K.C., C. W. Measor and *Guy Aldous* for the respondents. It is right to remember that the Copyright Act, 1911, was passed after an exhaustive inquiry with the view of unifying the law on the subject within the Empire; and its general frame is to give the copyright owner more than he previously enjoyed. In this case the first question is, are the remedies under s. 6 and under s. 7 alternative or cumulative? It is said for the appellants that they are alternative. That is not so. Where two sections ostensibly give two rights, they should be regarded as giving separate remedies. Sect. 7 gives a totally different remedy from anything that can be sued for under s. 6. There is no question of inconsistent remedies, and no reason has been shown why both should not be followed. Infringement of copyright and conversion are different things. There may be an action against a person for conversion although he may be quite innocent of any infringement of copyright, and, on the other hand, there may be an act of infringement committed by a person who has not committed a conversion. When s. 10 uses the words "an action of infringement," that involves the application of s. 6 only. It is asked, why should the Legislature have intended to give a different remedy in the case of infringement and conversion? The answer is that in the one case the act complained of may be inadvertent while in the other it may have been advertent. Suppose a publisher is bona fide under the impression that the copyright in a work has expired, and, so thinking, he prints copies of it, but while these are still in his warehouse he becomes aware that the book is still copyright and thereupon he hands over all the copies to the owner of the copyright. In such a case there could be no action of detinue or conversion under s. 7, but nevertheless an action would lie for the infringement.

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(1) [1936] Ch. 655.
(2) (1852) 17 Q. B. 937.
(3) (1863) 15 C. B. (N. S.) 330.
(4) (1860) 5 H. & N. 288.
(5) (1880) 5 App. Cas. 25, 32.
(6) (1879) 13 Ch. D. 574.
(7) [1892] A. C. 166.

With regard to the damages, the binding of the sheets was a mere physical act and cannot be taken as affecting the legal consequences. The binding was a revocable act, not so the sale of the work to the public. The reasoning of the South African case of *Braby* v. *Donaldson* (1) should be held to apply to the present case. There it was decided that a person whose copyright in a work has been infringed is entitled to demand delivery of all the copies of the offending work in the possession of the infringer, and also payment of the full price received by the infringer for all copies sold.

Hon. Sir Stafford Cripps K.C. and *E. J. Macgillivray* (2) in reply. As to damages the question is, what was the value of the article to the respondents at the time of the conversion? What could they have sold the sheets for? There could be no market for four sheets, and therefore the damages can be little more than nominal. On the question of limitation, Parliament was obviously intending that in respect of an infringement there should be a uniform term of limitation.

The House took time for consideration.

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(1) (1926) S. A. L. R. Sup. Ct. Rep. (Appellate Division) 337.

(2) By permission of the House, Mr. Macgillivray was allowed to complete the reply in the absence of Sir Stafford Cripps.

H. L. (E.)

1938

CAXTON PUBLISHING Co.
v.
SUTHERLAND PUBLISHING Co.

1938. Nov. 17. LORD THANKERTON. My Lords, I have had the privilege of considering the opinion of my noble and learned friend Lord Porter, with which I find myself in agreement, and I only desire to add some further observations on two of the four contentions of the plaintiff-respondents, videlicet, as to the applicability of the limitation provision of s. 10 to proceedings under s. 7, and as to the proper measure of damages.

On the question of limitation, I have felt less difficulty than my noble and learned friend, and I agree with the view expressed by my noble and learned friend Lord Russell of Killowen, whose opinion I have also been privileged to consider, with regard to the proper construction of s. 14. The question depends on whether proceedings under s. 7 constitute an action "in respect of infringement of copyright" within the meaning of s. 10. The plaintiffs contended that proceedings under s. 7 in respect of "infringing copies" might be taken in a case in which no infringement had occurred, having regard to the definition of "infringing" in s. 35, and the provisions of s. 14 as to the importation of copies. The argument is that copies imported in breach of the provisions of s. 14 are "imported in contravention of the provisions of this Act" and are therefore infringing copies within the definition in s. 35, though there has been no infringement of copyright. I agree with my noble and learned friend Lord Russell that, by its terms, s. 14 is made a substantive part of the Customs Consolidation Act, 1876, and that a contravention of the provisions of s. 14 constitutes a contravention of the provisions of the Customs Act, and not a "contravention of the provisions "of this Act" within the meaning of the definition in s. 35. The use in s. 14 of the phrase "prohibited by this section," in my opinion, presents no difficulty, when you find the express direction that the section is to have effect as if it was part of the Customs Act, for that, in my opinion, makes the prohibitions of the section substantive prohibitions of the Customs Act.

On the question of assessment of damages, I have little to add to the reasoning of my noble and learned friend Lord

Porter. Under s. 7 the plaintiffs are to be treated as fictional owners of infringing copies, which they did not create and would never have created. The conception of these infringing copies, where the plaintiffs' copyright matter is inextricably mixed by manufacture with the non-infringing matter, is in itself rather imaginary and problematical, and the question of their value is bound to be different from the question of what I may call the virgin value of the plaintiffs' copyright. The infringing copies are found in a setting created by the defendants, and I agree with my noble and learned friend that the Court, in assessing the damages, is entitled and bound to take that setting into account, and that this will fairly be done in taking some proportion of the total value of the volume, after making due allowance for expenses incurred after the act of conversion.

I concur in the motion about to be proposed by my noble and learned friend Lord Russell of Killowen.

LORD RUSSELL OF KILLOWEN. My Lords, in the course of the hearing of these consolidated appeals four matters arose for discussion and decision, namely :—

1. Whether on the true construction of the Copyright Act, 1911, the respondents are entitled in respect of the same copies both to damages for infringement under s. 6 and to damages for conversion under s. 7 ? Farwell J. held that they were not. The Court of Appeal held that they were.

2. Whether s. 10 of the Act applies to proceedings under or by virtue of s. 7 ? Crossman J. held that it did apply. The Court of Appeal (MacKinnon L.J. dissenting) held that it did not apply.

3. What was the act of the appellants by which the infringing copies were converted ?

4. What is the proper measure of the damages which the respondents sustained by reason of the conversion ?

Upon the first question I have had the advantage of reading and considering the opinions prepared by your Lordships upon this point, and I agree with the view that it is impossible to find any safe ground upon which we would be justified in holding

Lord Russell of Killowen.

that the Legislature intended that these remedies should be alternative and not cumulative.

The second question is one of some difficulty. One would think that, since s. 10 comes at the end of a group of five sections, grouped together under the title "civil remedies," the period of limitation thereby fixed was intended to apply to all proceedings for the enforcement of those remedies or any of them. The remedies are for the protection of copyright. To this prima facie assumption two objections are suggested: first, that an action under or by virtue of s. 7 is not "an "action in respect of infringement of copyright," and secondly, that proceedings might be taken under s. 7 in a case where there had not been any infringement of copyright, and that consequently in such a case no point of time could exist from which the period of three years would commence to run. The second objection needs explanation. It depends on the joint effect of the definition of "infringing" in s. 35, and the provisions of s. 14 relating to the importation into the United Kingdom of copies made out of the United Kingdom of any work in which copyright subsists which if made in the United Kingdom would infringe copyright. These copies I will for brevity refer to as foreign copies. The argument runs thus: "Infringing" when applied to a copy of a work in which copyright subsists means any copy made or imported in contravention of the provisions of the Act, therefore, "infringing copies" in s. 7 include copies imported in contravention of the provisions of s. 14; but innocent importation does not constitute infringement, therefore s. 7 applies to copies which may have come into existence without any act of infringement having taken place.

Having carefully considered the relevant provisions of the Act I have come to the conclusion that these objections cannot prevail. Sect. 14 it is true in terms prohibits the importation of foreign copies as to which the owner of the copyright gives notice to the Commissioners of Customs and Excise that he is desirous that such copies should not be imported, but the section is essentially a customs enactment. It provides (sub-s. 1) that the foreign copies as to which

Lord Russell of Killowen.

notice has been given shall be deemed to be included in the table of prohibitions and restrictions contained in s. 42 of the Customs Consolidation Act, 1876, and that that section is to apply accordingly. The Commissioners of Customs and Excise are given power (sub-s. 2) to make regulations respecting the importation and forfeiture of such foreign copies. Reference is, no doubt, made twice to the importation " which "is prohibited by this section." But sub-s. 6 provides that "The foregoing provisions of this section shall have effect as if "they were part of the Customs Consolidation Act, 1876." Now what is the effect of that ? It surely must be, indeed it cannot help being, that the prohibition of the importation of foreign copies after notice given is in law a prohibition of the Customs Act, and that copies so imported are imported in contravention of that Act and not in contravention of the Copyright Act.

This may seem at first sight a startling result, especially in the face of the specific words which occur in s. 14, namely, "the importation of which is prohibited by this section" ; but the prohibition it must be remembered is to have effect as if it were a prohibition which was part of the Customs Act. Moreover, this view produces consistency. For how can the fictional ownership conferred by s. 7 of the Copyright Act exist side by side with the provisions of the Customs Act as to forfeiture and destruction of the objects included in the table contained in s. 42 thereof ? Fictional ownership is inconsistent with the forfeiture and destruction contemplated by s. 42 of the Customs Act. The relevant words in the definition of " infringing," namely, " imported in contravention "of the provisions of this Act," may properly be referred to importations in contravention of the provisions of s. 2, sub-s. 2 (*d*), and s. 11, sub-s. 1 (*e*), and are therefore necessary to the definition.

The result is that if, as I think must be the case, s. 7 does not apply to copies which are imported notwithstanding the provisions of s. 14, the foundation of the argument upon this point disappears ; and there could never be a case of proceedings in respect of the conversion of infringing copies which had come into existence without any act of infringement having taken place.

If this be so, then in my opinion every proceeding in respect of such conversion may reasonably be described as an action "in respect of infringement of copyright," because the fictional ownership on which such proceedings are based involves the existence of a copyright and infringement of it, both of which facts would require to be pleaded and proved by the fictional owner.

A further consideration is this, that if s. 10 does not apply to proceedings under or by virtue of s. 7, the period of limitation applicable to those proceedings will vary according to the country in which the proceedings are instituted. Under the Act of 1842 a uniform period of one year was fixed by s. 26: but on the respondents' argument the period would be six years in England and forty years in Scotland, with the result that a plaintiff barred in England after six years could, upon founding jurisdiction in Scotland, claim in respect of all copies converted anywhere within forty years.

My Lords, I am conscious that on any view there are difficulties of construction under the Act, but with me what was called the positional argument weighs most strongly. The only answer to it seemed to be the alleged impossibility in certain cases under s. 7 of fixing a starting-point for the three years. For the reasons which I have endeavoured to explain this alleged impossibility does not exist. Accordingly the positional argument brings its full weight to bear, and I would hold that as a matter of construction s. 10 applies to proceedings under s. 7.

As regards the question what was the act of the appellants by which the infringing copies were converted, Crossman J. held that this took place when the order was given to bind up the sheets which contained the infringing matter. In the Court of Appeal, the Master of the Rolls and Romer L.J. held that the delivery to the purchasers was the act of conversion. MacKinnon L.J. thought it was the sale of the volumes. I do not know that this is a question of any very great moment in the present case; but in my opinion the act of binding together the sheets which contained the infringing matter was the act of conversion. The Master of the Rolls and Romer L.J. based their view on the supposition that the delivery was the first evidence of any intention by the appellants to deal with the infringing copies adversely to the plaintiffs. But as Atkin J. pointed out in *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll* (1) the question of intention is immaterial in cases where a man deals with goods as his own. If a man does that, you need not inquire as to his intention. MacKinnon L.J. thought that the sale was the act which made impossible any delivery up by the appellants; but a man can convert the goods of another without parting with the possession of the goods. The only relevant question here is, did the appellants deal with the infringing copies in a way inconsistent with the rights of the owner, and if so when? In my opinion the answer must be that they did so deal with them when they commenced to get them stitched together for the purpose of incorporating them with their own property into a composite article, namely, a book. They then unequivocally dealt with them as their own, and therefore in a manner inconsistent with the rights of the plaintiff.

The remaining question is, what is the proper measure of damages for that conversion, which was in fact an unconscious conversion?

My inclination, unassisted by your Lordships' opinions, would be to award only a small sum of some 35*l.* or thereabouts. This would be upon the footing that the fictional property of the respondents which has been converted is not to be valued as being a proportionate part of a completed whole, but merely as being pieces of paper with printed matter thereon for which the appellants would be prepared to pay a sum equal to what it would cost them to replace them. But Crossman J., the Court of Appeal and all your Lordships think otherwise. In these circumstances I am not prepared to disturb this pleasing unanimity.

For the reasons which I have stated I would affirm the order of the Court of Appeal dated February 7, 1936, and

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(1) 88 L. J. (K. B.) 601, 605.

I would discharge the order of the Court of Appeal dated November 15, 1937, except in so far as it ordered the appellants here to pay the costs occasioned by their notice by way of cross-appeal. I would order the respondents here to pay the costs of their appeal to the Court of Appeal by notice dated February 19, 1937, and also to pay to the appellants here two-thirds of their costs of the consolidated appeals to your Lordships' house.

LORD MACMILLAN (read by LORD PORTER). My Lords, I am of opinion that on a sound construction of the Copyright Act, 1911, the remedy of damages for infringement provided by s. 6 and the remedy of damages for conversion provided by s. 7 are not in law mutually exclusive and that the respondents are entitled in the present case to recover under both heads.

I am also of opinion that the triennial limitation enacted in s. 10 of the Act applies to a claim of damages for conversion under s. 7.

As regards the act of conversion, this was in my view the binding up of the infringing sheets with the innocent sheets so as to form the volumes produced by the appellants. The question of the quantification of the damages for conversion I have found to be by no means an easy one. The difficulty lies not so much in determining the principle on which damages for conversion should be awarded, for that is well settled, as in the application of the principle to a highly artificial situation. I am not satisfied that the Court of Appeal have erred in the method which they have adopted and I accordingly agree with your Lordships that the damages under this head should be assessed at 150*l.*, being the figure which the Court of Appeal would have awarded had they held that the triennial limitation was applicable.

Having reached these conclusions I concur with the motion which I understand your Lordship on the Woolsack is about to put to the House.

LORD ROCHE. My Lords, I have had the advantage of reading in advance the opinions both of those of your Lordships who have already spoken and of my noble and learned friend Lord Porter. It is unnecessary for me either to recapitulate the facts, or, save on one point, to add many observations to those which are contained in those opinions.

As to the first point: I think with all your Lordships that the Court of Appeal was right in reversing the judgment of Farwell J. and that the remedies are not alternative.

As to the second point, the period of limitation: The construction of the material sections of the Act seems to me to raise questions of great nicety and difficulty and I confess that my mind has fluctuated as to the true conclusion to be reached. But upon the whole I think that the result arrived at by MacKinnon L.J. in his dissenting judgment is correct and that the appeal upon this point should be allowed.

As to the third point, the relevant act of conversion: This was, in my opinion, the binding of the sheets, but I regard the act or process of stitching or binding as one and continuous from its commencement to its conclusion. I therefore regard the whole act or process as the act of conversion.

As to the fourth point, the measure of damages: I entertain no doubt but that the judgments of Crossman J. and of the Court of Appeal were right as regards this matter, and I will state my reasons for my conclusion.

The case for the appellants that the damages should be assessed at some small sum, be it 15*l.* or 36*l.*, is in my opinion in contradiction to the principles of the law applicable to the assessment of damages generally and to those applicable in particular to the assessment of damages in respect of the tort of conversion.

As to damages in general there is no question but that the respondents are entitled to a just sum by way of indemnity to represent their loss by reason of the wrong done to them. That which on the appellants' case would be allowed seems to me to fall far short of representing such loss. The sheets were not merely capable of forming part of a complete work. They were adapted and destined and used for that purpose. They in fact formed one-twentieth part of a volume to be

H. L. (E.)
1938
CAXTON PUBLISHING CO.
v.
SUTHERLAND PUBLISHING CO.
Lord Roche.

sold at 20s. and in fact sold at that price to the extent of 3500 copies in the course of three years alone. In my judgment in assessing loss regard was properly given to that outstanding fact and to ignore it would be to ignore the realities of the case.

The line of reasoning adopted by Crossman J. and the Court of Appeal seems to me to be equally justified by a consideration of the rules as to damages for the particular tort now in question. There is no dispute but that the measure of damages is the value of the thing converted at the time of the conversion. It is true enough to say that the value is the value to the owner; but it is wrong to say this if you mean what the owner will make out of the thing in money if it is not taken away from him. This latter idea was repelled by this House in a series of cases dealing with such trespasses to goods as deprived the owner of them temporarily. They were cases where the owner either did not use the things at all or not for money gain, for example, spare lightships and dredgers. *The Mediana* (1) is an instance. It was said in the judgment of Lord Halsbury L.C. in that case that, if the owner of a chair was deprived of it, it was no ground for giving nominal damages that he did not want to sit upon it: and that it might be necessary in such cases to resort to a variety of tests of value during the time of deprivation. One such suggested test was what would have to be paid by way of hire for such a chair or any chattel in question. It is true that that was a case of trespass and not conversion, but Lord Halsbury L.C. said that the same principles applied. So with permanent deprivation or wrongful appropriation of a chattel one of a variety of tests may be the best available test of value according to circumstances. In *Reid* v. *Fairbanks* (2) there was a very good one available —because the true owner had contracted to sell a ship under construction when finished for x pounds. Held, or rather agreed (because the actual decision was on another point) that the damage was x-y, y representing the cost of finishing the construction. Here, unfortunately, the available material

(1) [1900] A. C. 113.

(2) (1853) 13 C. B. 692.

is very different and not so easy to deal with. The sheets in question only became the respondents' property after the appellants had brought them into existence by reproducing the respondents' letterpress and illustrations in a form useful not for the respondents' publication but for their own. I conceive the proper test here is what ought the appellants to have paid for that matter in the form it was when converted. I say " ought to have paid " because of certain cases I propose to refer to, but I do not think that the test of what they would have paid would yield a different result. The cases are such cases as were mentioned by appellants' counsel relating to trespass to land by the removal of coal, timber, etc. These cases contain reference to a doctrine distinguishing an innocent from an intentional or fraudulent trespasser for the purposes of damages which is unknown to the law of conversion, but the utility of the cases seems to consist in the reference in the judgments and orders made to the " fair value " to be assessed. In one of them, *Burmah Trading Corporation, Ld.* v. *Mirza Mahomed Ally Sherazee* (1), the available test of value adopted was the price realized or to be realized less expenses to be incurred in securing it. In such cases, to treat the wrongdoer as if he were a purchaser appears to me to be right. In assessing what he ought to pay or, what is the same thing, what is the fair value of the thing in question, its adaptability for a particular use may be an important element in its value. The triptych example furnished by the Court of Appeal is a strong example of this and seems to me to be much in point here. The parties in this case seem to have proceeded on this basis of value. All the material put before Crossman J. was submitted on this basis—the figures and the agreement about the one-twentieth proportion seem to me to be consistent with no other view. The only question was what items should represent the true value. The appellants said the cost of printing at most. Crossman J. thought this was wrong, so did the Court of Appeal, and it was unanimous upon this point. A similar conclusion had been reached in *Ash* v.

(1) (1878) L. R. 5 Ind. App. 130.

Dickie (1), which I think was rightly decided. I am of opinion that in the present case Crossman J. and the Court of Appeal were right in rejecting the appellants' contention. It is not easy to see why the cost of printing only is to be taken. The articles in question would seem to be worth at least replacement value and to replace the printed material would require the employment of a writer and a process engraver at the cost of money, to which would fall to be added a proper share of all overhead and standing charges. I entirely accept the view that expenses incurred after the conversion should come off, and although the binding was the only one which appears to have been so characterized below I should have been prepared, had the appellants made a case asking for further proof, to consider whether there should not be a remit to Crossman J. to deal with other expenses. But no such case or request was made, and the appellants stood on their printing basis. That seems to me, as I have said, to be wholly wrong.

I agree with my noble and learned friend Lord Porter that the proper inquiry is not what the appellants would have given or the respondents have taken for the pirated material. As the appellants in fact used the material, the proper inquiry is as to its fair value. However, if the other test were to be adopted, I do not believe that, committed as the appellants were to this composite work, many copies of which had been sold as the process of conversion continued, they could reasonably have said and in business would have said anything other than that they would pay up to a proportion of the sale price less what it would still cost them to realize that price. The Court was bound to exercise its judgment on the materials submitted to it in a rather exceptional and peculiar case where direct evidence of the parties or of experts would be either useless or inadmissible, and though it may have proceeded by "a rusticum judicium," in my opinion Crossman J. hit upon a figure which represents as nearly as may be the value to be assessed, and to interfere with it would in the circumstances be wrong and to replace it by the

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(1) [1936] Ch. 655.

H. L. (E.)

1938

CAXTON PUBLISHING Co. v. SUTHERLAND PUBLISHING Co.

appellants' figures would, in my opinion, for the reasons I have given, be unjust and erroneous.

I am therefore for allowing the appeal only on the point of the period of limitation and for restoring the judgment of Crossman J.

LORD PORTER. My Lords, this action raises a number of questions of some importance, two involving the construction of the Copyright Act, 1911, and two raising the more general question of the damages to be awarded against those who have, though inadvertently, made use of matter containing the copyright of others.

It arises in this way. The plaintiffs are the owners of the copyright in a literary work entitled " Heating and Ventilating." The defendants are the publishers of a book entitled " The Modern Practical Plumber " and have caused to be printed and sold a number of copies thereof.

It is admitted that certain portions—we were told portions of four sheets—of the defendants' work are infringements of the plaintiffs' copyright.

The plaintiffs by writ dated May 2, 1935, brought an action against the defendants claiming (1.) an injunction restraining the infringement; (2.) an inquiry as to damages; and (3.) delivery up of all infringing books and material.

The defendants admitted the infringement and, while relying on s. 10 of the Copyright Act, 1911, and the Statute of Limitations, offered to submit to judgment on their admissions. But they contended (1.) that the plaintiffs were not entitled to both damages for infringement of copyright under s. 6, sub-s. 1, of the Act and at the same time to damages for conversion under s. 7: they said the plaintiffs must elect which remedy they would take; (2.) that the limit of three years provided by s. 10 of the Act applied both to a claim for infringement under s. 6 and to a claim for conversion under s. 7; (3.) that the conversion was the printing or order to bind or binding of their work, and not its sale; and (4.) that the damages were not to be calculated by finding the price of their complete work (of which the part containing

Lord Porter.

the plaintiffs' copyright constituted only a small fraction) and then attributing to the plaintiffs' copyright some portion of that price after making due allowance for the cost of binding, but was the value of the plaintiffs' work to the plaintiffs as contained in the four sheets, a value which they said was mere pulping value or at most a small portion of the cost of the production of the whole work.

At the hearing before this House they were content to take the binding as the act of conversion, and both sides accepted the position that if the damages for conversion were to be calculated by reference to the value of the whole volume the proper proportion to be taken was one-twentieth.

As to the first point Farwell J., who was asked to give a decision upon that alone, decided that the remedies under ss. 6 and 7 were alternative and not cumulative. He was reversed by the Court of Appeal, who held that the damages were cumulative but that care must be taken that they do not overlap so as to give the plaintiffs the same damages twice over.

Upon the other points Crossman J., to whom they were referred after the judgment of the Court of Appeal, decided that the three years' limit applied to both claims, that the order for binding was the conversion and that the only way in which he could determine the value of the respondents' portion of the work was to take the selling price of the whole volume, find what proportion was attributable to the plaintiffs, and, after making due allowance for the binding (which in his view was an expense incurred after the conversion), to divide the total price by that proportion and multiply it by the number of copies sold.

In this way he arrived at a sum of 1*s.* per volume as the value of that part of the work which infringed the plaintiffs' copyright, and as about 3000 copies had been sold during the three years preceding the date on which action was brought, at a sum of 150*l.* as the value of the converted portion.

He found also that the plaintiffs had not by reason of the infringement suffered any loss of sales and he therefore awarded no sum to the plaintiffs in respect of any such loss.

H. L. (E.)
1938
CAXTON PUBLISHING CO.
v.
SUTHERLAND PUBLISHING CO.
Lord Porter.

But he found that the plaintiffs had suffered in reputation from the infringement and gave a sum of 50*l.* as damages under this head. Of this last award no complaint is made.

The Court of Appeal differed from the learned judge, taking the view, by a majority, that the three years' limitation applied only to the damages under s. 6, and that the ordinary period of six years was the proper period of limitation under s. 7. They also held that the act of conversion was not the order for binding but the sale of the infringing work. Otherwise they affirmed the judgment of Crossman J., and so arrived at a figure of 494*l.*, since the number of copies sold during six years before action brought multiplied by 1*s.* per volume made up that figure.

The appellants argued in the Court of Appeal, as they had argued before Crossman J., that the true measure of value was the value of the infringing portion of the four sheets to the plaintiffs, that that value was no more than the pulping value, since the plaintiffs could make no use of them, or, if the possibility of the defendants paying for them rather than incurring the expense of having the peccant sheets rewritten and reprinted is to be taken into consideration, the value was at most something slightly more than the cost of printing those sheets and of the paper itself; that sum they said was approximately represented by one-twentieth of 1*s.* 4*d.* per volume.

They further argued that in any case the value of each volume was not 21*s.* less binding, but that a proper sum for the cost of disposing of the volumes sold, so far as that cost was incurred after the conversion, must be deducted.

As to (1.) the Act by s. 6 gives certain remedies for infringement of copyright, remedies which include an injunction, damages, and accounts. By s. 7 it enacts that infringing copies shall be deemed to be the property of the owner of the copyright and states that accordingly the owner may take proceedings to recover possession of them or in respect of their conversion. I do not see that these rights are necessarily inconsistent one with another—no doubt, as is pointed out by the Master of the Rolls (Sir Wilfrid Greene), the

H. L. (E.)

1938

CAXTON PUBLISHING CO. v. SUTHERLAND PUBLISHING CO.

Lord Porter.

damages may overlap, but the overlapping of damages is no new thing in English law. Two persons may cause an accident by separate acts of negligence and judgment for the whole damages may be given against each. So, too, damages to the full value of the property converted may be given against two persons for successive conversions of the same chattel and, until payment in full of the sum awarded is made by one of the defendants, the judgment remains in force against the other.

In neither case, however, would the plaintiff be permitted to recover more than the sum awarded for the injuries received or the value of the chattel as the case might be, because the law will not permit any greater sum to be recovered than the actual damage suffered.

It was sought to distinguish those cases from the present on the ground that in them the recovery was against two persons and in the present case both sets of damages would be awarded against the same person.

No doubt where the judgment is against one person the recovery of double damages would be avoided not by preventing the receiving of double damages after judgment given, but by diminishing the damages given under the judgment, e.g., in the present case by diminishing the damages under the head of infringement so that they do not include anything given under conversion. But of the two methods the second seems to give rise to the lesser difficulty if there be in fact any difference in principle.

The argument to the contrary, however, as I understand it, proceeds thus. Sect. 6 gives amongst other remedies damages for infringement or an account of profits: those remedies are alternative not cumulative. An account of profits is also alternative to damages for conversion and therefore damages for infringement are alternative to damages for conversion.

I do not think the result follows. The grounds on which a claim for damages and an account have been held to be incompatible are that a claim for an account condones the infringement: *De Vitré* v. *Betts* (1) and *Neilson* v. *Betts*. (2)

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(1) (1873) L. R. 6 H. L. 319.

(2) L. R. 5 H. L. 1, 22.

H. L. (E.)
1938
CAXTON PUBLISHING CO.
v.
SUTHERLAND PUBLISHING CO.
Lord Porter.

For the same reason, namely, that by doing so the plaintiff affirms the action of the converter, it is possible for a plaintiff to lose his remedy in conversion by electing to sue for money had and received and so waiving the tort: *Smith* v. *Baker.* (1) But in the present case the respondents have not sued for an account or for money had and received, and I cannot see that they have waived their remedy either for the one tort or the other by electing to sue for both as torts. To succeed the appellants must show that the remedies under s. 6 and s. 7 are mutually exclusive, and I do not think they have done so.

Indeed there are indications in the two sections which lead to a contrary conclusion. Could it be said, for instance, that where a defendant has in his possession infringing plates and has by their means produced and sold infringing copies, a plaintiff would lose his remedy for infringement because he also claimed in detinue to recover the plates. So to hold would prevent the plaintiff from recovering his actual loss by reason of the infringement even though he might recoup himself by using the plates to make his own copies. He might not desire to do so, and in any case the Act has made the plates his to use as he pleases. I think the decision of the Court of Appeal was right in this case and that at any rate, so far as it involved the same view, the decision of the Court of Appeal in *Ash* v. *Hutchinson & Co.* (2) was right also.

(2.) The limitations of time in respect of which recovery may be made under this Act give rise to great difficulty.

The words to be construed are contained in s. 10, and are as follows: " An action in respect of infringement of copyright "shall not be commenced after the expiration of three years "next after the infringement."

Does this section apply only to an action for infringement under s. 6, or does it also cover an action brought under s. 7 in respect of infringing copies?

By s. 35 of the Act " Infringing when applied to a copy ". . . . means any copy made or imported in contravention "of the provisions of this Act."

(1) (1873) L. R. 8 C. P. 350.

(2) [1936] Ch. 489.

When, therefore, s. 7 uses the phrase "infringing copies" the words "copies made or imported in contravention of the "provisions of this Act" may be substituted. The difference between the words used in s. 6 and s. 7 is marked and patent. In s. 6, sub-s. 1, they run "where copyright has been infringed"; in s. 6, sub-s. 2, "in respect of infringement"; in s. 6, sub-s. 3, "for infringement" and in s. 6, sub-s. 3 (*b*), "in "respect of the infringement." Unless the words "infringing "copies" connote infringement, there is no mention of infringement in s. 7.

Of course, if no action in respect of an infringing copy is possible save where there has been an infringement, such an action might well be included in the phrase "action in respect "of an infringement."

Is then an infringement necessary in the case of an infringing copy?

One instance to the contrary is suggested in the case of a copy which is imported in contravention of s. 14 of the Act: i.e., a copy which is made out of the United Kingdom of any work which if made in the United Kingdom would infringe copyright and as to which the appropriate notice to the Commissioners of Customs and Excise has been given.

That section in terms forbids the importation of such copies and speaks of them as "prohibited by this section."

It was argued on behalf of the appellants that importation in breach of the terms of s. 14 was not in essence a contravention of the Copyright Act, 1911, but was really a breach of the Customs Consolidation Act, 1876, and that the true effect of s. 14 was merely to apply the provisions of the Customs Consolidation Act to attempts to import copies of matter which is the subject of copyright in this country.

It was further contended that infringing copies could not have been intended to include copies imported in contravention of that section since the Customs Consolidation Act made the copies forfeit and subject to destruction or other disposal as the Commissioners of Customs might direct. Such a right in the Commissioners, it was said, was inconsistent with the ownership being deemed to belong to the owner of the copyright under s. 7. Sect. 14, the appellants argued, assumed that the copies would be seized at the place of importation, or at any rate by the Commissioners, and, though they might escape detection, they could not be said to be "imported" within the meaning placed upon that word in the definition of "infringing" in s. 35. In this view imported infringing copies would be confined to copies which the importer knew to be infringements or of which he knew that they would be infringements if made in the place of importation.

The difficulty caused by the wording of s. 35 persists, but the contention has force.

It is strengthened by the position of s. 10 at the end of a number of sections headed "Civil remedies," amongst which is included s. 7, and by the fact that even a three years' limitation is an extension of the one year given by the Copyright Act of 1842. Its weakness lies in the distinction apparently drawn in the wording of the later Act between infringement and infringing copies and in the difficulty of ascertaining the date from which time is to run where no infringement in fact takes place.

In the case of an argument so evenly balanced I should not myself have felt justified in differing from the majority of the Court of Appeal. But as your Lordships take a different view I am not prepared to dissent from the opinions which have been expressed.

I am the more ready to accept this view, as I cannot but believe that whatever its wording may express, the intention of the Act was to limit the right of action to a term of three years in all cases.

Damages.

Under this head two further questions arise: (3.) What is the act of conversion? and (4.) what damages flow from that act?

As to (3.) conversion was defined by Atkin J., as he then was, in *Lancashire and Yorkshire Ry. Co.* v. *MacNicoll.* (1) "Dealing," he said, "with goods in a manner inconsistent "with the right of the true owner amounts to a conversion, "provided that it is also established that there is also an

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(1) 88 L. J. (K. B.) 601, 605.

"intention on the part of the defendant in so doing to deny "the owner's right or to assert a right which is inconsistent "with the owner's right."

This definition was approved by Scrutton L.J. in *Oakley* v. *Lyster*. (1)

Atkin J. goes on to point out that, where the act done is necessarily a denial of the owner's right or an assertion of a right inconsistent therewith, intention does not matter. Another way of reaching the same conclusion would be to say that conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intend to challenge the property or possession of the true owner.

In the present case Sir Stafford Cripps, I think rightly, conceded that the mere printing of the infringing matter could not amount to conversion since no copy, and therefore no infringing copy, was in existence until after the printing had been done. He further admitted that he could not rely upon the order for binding. Until the binding took place, the infringing matter was still under the control of the defendants in an unaltered form and mere possession of the property of others is not conversion, since by a fiction the original possession is regarded as lawful.

But he argued that the infringing copy was not the book or part of the book, but such portion of the four unbound sheets as contained infringing matter, and that the binding was the act of conversion.

With the last contention I agree. I think the binding was an act inconsistent with the owner's right. This is a view midway between that held by Crossman J. and the Court of Appeal. I should myself have thought that the conversion was not complete until the binding was complete, and that we must not too meticulously regard the conversion as taking place when the binders insert the first or second stitch. Therefore, when one is considering the value of the infringing matter one should regard it as part of a bound volume ready for sale and what the appellants would pay to avoid unstitching

(1) [1931] 1 K. B. 148, 153.

and rebinding is one of the matters to be taken into account. But I doubt if this makes any or any substantial difference to the value I should put upon the infringing matter.

As to (4.) there is no dispute as to the principle on which in general the measure of damages of conversion is calculated. It is the value of the thing converted at the date of the conversion, and this principle was accepted by both sides in the present case. But I should wish to leave open for consideration in a case in which it directly arises the question whether the statement of Abbott C. J. in *Greening* v. *Wilkinson* (1) that the jury "may give the value at the time of the conver- "sion or at any subsequent time" can be supported or not.

The appellants sought to place a qualification upon the words "the value of the thing converted" by adding the words "to the owner."

Such a qualification is, I think, inaccurate and likely to lead to confusion of thought.

I do not accept the view that an article has no value or a diminished value to its owner because he has no machinery for selling it. Has a book a different and diminished value to me who have just purchased it from what it had a moment before in the hands of the bookseller, even though the bookseller will not take it back and I have no market for its sale? The value is not necessarily the price for which the owner could sell the article. Is a publisher who infringes an author's copyright to make a large profit out of an unexpectedly successful book because he could have bought the copyright cheaply if before the publication he had approached the author and paid his price? Even the loss of the use for a time of a chattel which the owner would not have used during that time may give rise to substantial damage whether in an action for damages or in an action for conversion: see *The Mediana*. (2) It is the value known or unknown which has to be paid, and that value is not necessarily the price which the owner could have obtained or would have taken. It may have to be ascertained by finding out what price for the infringing matter, in the form in which it is offered, the public

(1) (1825) 1 C. & P. 625, 626.

(2) [1900] A. C. 113.

or some individual is prepared to pay, or in some other way in the light of after events.

In the present case, so far as one is able to judge by the steps which they took, the respondents were not anxious to dispose of their copyright at all. They claimed in the action an injunction to prevent further infringements of copyright and delivery up of all infringing matter in the appellants' hands. They could claim damages only for conversion in respect of the matter used in the copies sold, since it was too late to recover the matter itself. I will assume that the infringing matter is such part of the four sheets before binding as contains a portion of the respondents' copyright.

If the sheets were still in the appellants' possession, the infringing matter might be cut out and handed over to the respondents. Obviously this material would be useless to them, but equally the appellants would be left with four mutilated sheets, parts of volumes which they desired to bind at once and sell, volumes which, judging from the figures supplied to the Court, the market was ready to absorb. To cope with this demand the appellants would have had to employ some one else to fill up the gaps left, to reprint the peccant sheets and bind the volumes. In those circumstances, I cannot but think they would have paid a substantial price for the copyright matter printed in the infringing sheets, and I do not think I should regard 1*s.* a copy as too much. In truth, however, I do not think myself justified in speculating as to what sum in a bargain between the appellants and the respondents the one would pay or the other accept.

Indeed to inquire what is the value of the infringing matter so removed from its context is to my mind an artificial way of considering the problem. The respondents' property has in fact been incorporated in the appellants' volume and sold to the public. The appellants never considered what they would have been willing to pay as each infringing copy was bound into the volume, nor the respondents what they would have been willing to receive if they had been prepared to sell at all. The two parties have in fact combined in furnishing (though unwittingly on the respondents' part) material for a volume in which it was afterwards incorporated and sold.

In such circumstances, if one considers how the property has actually been treated, the value of the respondents' part is not unfairly calculated by taking some proportion of the total value of the volume (after making due allowance for expenses incurred after the act of conversion) and multiplying that proportion by the number of copies sold. This was the method adopted by both Courts below, and in principle I think in the cases of *Ash* v. *Dickie* (1) and *John Lane* v. *Associated Newspapers.* (2) I can see no legal objection to its adoption. If no such method can be adopted, then I see no answer to the difficulty suggested in the Court of Appeal arising in a case where A converts three parts of a triptych belonging to three separate owners X, Y and Z, joins them together and produces an article infinitely more valuable than the sum of its parts. To hold that X, Y or Z can recover only what he would get for his part in a market in which the other parts are not procurable would be to leave the converter in possession of a large sum of money to which none of the owners would be entitled.

The resultant figure is, of course, but a rough and ready test of the true value and must be modified by the Court which has to determine it in accordance with the facts of each case; but in the present case it is admitted that, if the method adopted was not wrong in principle, the proportion of one-twentieth was not unfair.

Some discussion took place as to what allowances were permissible. The cost of binding has been allowed, but Sir Stafford Cripps contended that the cost of collection and delivery, and the expense of advertising and selling, should also be deducted.

I should myself be for allowing all expenses properly and necessarily incurred by the appellants after the conversion in selling the volumes containing the respondents' copyright matter in so far as those expenses would not have been incurred but for the sale of those volumes. But the appellants are

(1) [1936] Ch. 655.

(2) [1936] 1 K. B. 715.

wrongdoers, albeit unintentional wrongdoers, and it is for them to show that, after the conversion took place, they have necessarily expended the money for which they seek to get credit.

It is admitted that there is no evidence to this effect except the probability that the expenses claimed, or at any rate some part of them, would be incurred after that date. I see no ground for making this assumption. It may be correct or not. It has not been proved and in any case it is not clear that the same expenditure would not have taken place whether the appellants had sold the infringing volumes in the course of their general business or not.

I would concur with the order proposed by my noble and learned friend Lord Russell of Killowen.

First appeal dismissed.
Second appeal allowed.

Solicitors for appellants: *Oswald Hickson, Collier & Co.*

Solicitors for respondents: *White & Leonard & Nicholls & Co.*

[HOUSE OF LORDS.]

TENNANT . . . . APPELLANTS ; H. L. (Sc.)*

AND 1939

LORD ADVOCATE . . . . RESPONDENT. *Feb. 7, 23.*

Revenue—Estate duty—Property deemed to pass on death—Aggregation—Policy of insurance assigned to trustees during lifetime of deceased in trust for payment of death duties—Whether proceeds to be aggregated with deceased's general estate for assessing rate of duty—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 2, *sub-s.* 1 (*d*), 4.

By s. 4 of the Finance Act, 1894 (as amended by the Finance Act, 1900), all property passing on the death of a person, in respect of which estate duty is leviable, is to be aggregated so as to form one estate, " provided that any property so passing, " in which the deceased never had an interest, ... shall not " be aggregated with any other property, but shall be an estate " by itself, and the estate duty shall be levied at the proper " graduated rate on the principal value thereof."

T. effected an insurance on his life and assigned it to trustees, who were directed on his death to pay to the trustees of his will, out of the proceeds of the policy, all sums payable in respect of death duties on his estate and the expenses incurred by them in payment thereof and any residue to his surviving children. On T.'s death the net proceeds of the policy, 75,328*l.* 13*s.* 7*d.*, were so paid to the trustees of the will :—

Held, that the sum of 75,328*l.* 13*s.* 7*d.* was not " an estate by itself " within the proviso to s. 4 of the Finance Act, 1894, inasmuch as T. had from the commencement of the policy's existence an interest, and for many years the sole interest, in the proceeds, and, even after the assignment, he had a contingent interest by way of resulting trust, of which he could have disposed inter vivos or by will.

Attorney-General v. *Pearson* [1924] 2 K. B. 375 approved and applied.

Decision of First Division of Court of Session 1938 S. C. 224 affirmed.

APPEAL from a decision of the First Division of the Court of Session. (1)

The appellants were the trustees under the will of the Right Honourable Harold John Tennant, who died in 1936, having in his lifetime assigned and conveyed in trust to trustees and for the trust purposes a policy of insurance on his life, those trustees being directed, on the death of the deceased, to pay to the trustees of his will out of the proceeds of the policy all sums payable in respect of death duties on his estate and the expenses that might be incurred by them in payment thereof, and the residue to his surviving children equally.

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(1) 1938 S. C. 224.

* *Present :* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

The net proceeds of the policy amounted to 75,328*l.* 13*s.* 7*d.*, and this sum was paid over to the appellants, the trustees of the will, who made payments to account of death duties on the deceased's estate of 106,368*l.* 17*s.* 9*d.* A question then arose between the appellants and the Inland Revenue Commissioners whether the said sum of 75,328*l.* 13*s.* 7*d.* paid under the policy of insurance was "an estate by itself" within s. 4 of the Finance Act, 1894 (1), or whether it was property which, for the purposes of determining the rate of estate duty to be paid on property passing on the death of the deceased, fell to be aggregated with the other estate of the deceased. The Commissioners assessed the sum of 75,328*l.* 13*s.* 7*d.* for estate duty on the latter basis. It appeared that the appropriate rate of assessment, if the said sum fell to be aggregated, was 32 per cent.; if the sum constituted "an estate by itself" the appropriate rate was 18 per cent.

The First Division held that the sum in question was not property in which the deceased "never had an interest," and therefore was not to be treated as "an estate by itself" within the meaning of s. 4 of the Finance Act, 1894.

The trustees appealed to this House.

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(1) Finance Act, 1894, s. 4 (as amended by Finance Act, 1900): "For determining the rate of "Estate duty to be paid on any "property passing on the death of "the deceased, all property so "passing in respect of which Estate "duty is leviable shall be aggre-"gated so as to form one estate, "and the duty shall be levied "at the proper graduated rate "on the principal value thereof: "Provided that any property so "passing, in which the deceased "never had an interest, ... "shall not be aggregated with any "other property, but shall be an "estate by itself, and the Estate "duty shall be levied at the proper "graduated rate on the principal "value thereof. . . . ."

Cyril Radcliffe K.C. and *J. L. Duncan* (of the Scots Bar) for the appellants. The property which is the subject of tax is not the policy but the policy money which is paid after the death of the assured. If that is right, and it is submitted that it is, can it by any fair use of language be said that a man who dies before the property comes into existence ever had an interest in the property? The deceased provided the policy, not the policy money. This view was accepted by Rowlatt J. in *Attorney-General* v. *Pearson* (1) where, although the facts do not assist, he said (2): "Though it may not be "strictly necessary to decide the point for the purposes of "the present case, I may say that it seems to me that in a "case like this in which the policy is settled there is no "property which passes on the death of the deceased under "s. 1 alone, however it would be if the policy were unsettled. "Whatever the property in the policy may be, it has gone "from the deceased before his death. If he has no living "interest in the policy there is nothing to pass on his death." If this contention is right, it follows that there cannot be aggregation. See also *Attorney-General* v. *Dobree* (3) and *Inland Revenue* v. *Scott's Trustees.* (4)

[LORD THANKERTON. The proviso to s. 4 of the Act of 1894 says that property passing in which the deceased never had an interest is not to be aggregated; but can it really be said that the deceased in this case never had an interest in his lifetime in the policy?]

The word "interest" in the proviso must mean an interest in property, and here no property came into existence till after the assured's death. That is the function of a policy of insurance. It is quite plain that the Legislature in using the word "interest" meant something analogous to an estate.

[They also referred to *Attorney-General* v. *Robinson* (5); *Attorney-General* v. *Quixley* (6); *In re Hodson's Settlement.* (7)]

T. M. Cooper L.A., *J. H. Stamp*, and *T. B. Simpson* (of the Scots Bar) for the respondent were not called upon.

(1) [1924] 2 K. B. 375.
(2) Ibid. 386.
(3) [1900] 1 Q. B. 442.
(4) 1918 S. C. 720.
(5) [1901] 2 I. R. 67.
(6) (1929) 98 L. J. (K. B.) 315.
(7) [1938] Ch. 916.

The House took time for consideration.

1939. Feb. 23. LORD ATKIN. I agree with the opinion about to be read by Lord Russell of Killowen.

LORD THANKERTON. I also agree.

LORD RUSSELL OF KILLOWEN. This is an appeal against an interlocutor pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland. The question for our decision is whether a sum of about 75,328*l.* paid under a policy of assurance on the life of the late Harold John Tennant falls within the proviso to s. 4 of the Finance Act, 1894, with the result that it constitutes a separate estate and must not be aggregated with his general estate. It is not in dispute that estate duty is payable in respect of the 75,328*l.*; it is merely a question of what is the appropriate rate, which will vary according as the proviso does or does not apply.

Sect. 4 (as amended by the Finance Act, 1900) runs thus:—

"4. For determining the rate of Estate duty to be paid "on any property passing on the death of the deceased, all "property so passing in respect of which Estate duty is "leviable shall be aggregated so as to form one estate, and the "duty shall be levied at the proper graduated rate on the "principal value thereof:

"Provided that any property so passing, in which the "deceased never had an interest . . . . shall not be aggregated "with any other property, but shall be an estate by itself, and "the Estate duty shall be levied at the proper graduated rate "on the principal value thereof. . . . ."

The relevant facts of this case may be stated shortly.

Mr. Tennant, whose trustees are the present appellants, died on November 8, 1935. He had on his own behalf effected with the Star Life Assurance Society a policy on his own life dated July 26, 1911, for the sum of 100,000*l.* The policy provided that, in the event of the assured's death after July 21, 1936, the sum of 100,000*l.* should be paid to his executors, administrators, or assigns. In the event (which happened) of the assured's death before July 22, 1936, the whole of the premiums paid with compound interest fell to be returned to the assured's executors, administrators, or assigns. By assignation and deed of trust dated June 1, 1931, the deceased assigned the policy to trustees for (first) payment of the expenses of the trust; (second) payment to his executors or testamentary trustees of all the proceeds of the policy in satisfaction of all death duties payable on or by reason of his death upon and in respect of all and any property whatsoever passing on his death; and (third) payment of any residue to his surviving children equally among them, with a destination-over to the issue of predeceasing children. Mr. Tennant paid the premiums due up to the time of the assignment. No separate fund was provided by him for payment of the subsequent premiums; these were raised upon the security of the policy. At the date of the death the gross amount receivable under the policy was about 88,553*l*. The amount due in respect of premiums and interest (less tax) was about 13,224*l*. The net amount payable was the sum of about 75,328*l*.

The Commissioners of Inland Revenue assessed the estate duty at the rate applicable upon the basis that the 75,328*l*. should be aggregated with the general estate.

The trustees appealed against this assessment to the Court of Session, and on January 4, 1938, their Lordships of the First Division, by interlocutor of that date, affirmed the decision of the Commissioners, but gave leave to appeal to your Lordships' House.

The case was argued both in the First Division and before your Lordships upon the footing that, in regard to the policy, estate duty was leviable upon property passing on the death of the deceased by virtue of s. 2, sub-s. 1 (*d*), of the Finance Act, 1894, which provides that—

"2.—(1.) Property passing on the death of the deceased "shall be deemed to include the property following, that is "to say . . . . (*d*) Any annuity or other interest purchased "or provided by the deceased, either by himself alone or in

Lord Russell of Killowen.

"concert or by arrangement with any other person, to the "extent of the beneficial interest accruing or arising by "survivorship or otherwise on the death of the deceased."

The Lord President thought that the real question for decision was whether the deceased had at any time an interest in whatever was (in regard to the policy) the property which under s. 2, sub-s. 1, of the Finance Act, 1894, was to be deemed included in property passing on his death. He thought that the word " interest " as used in the proviso to s. 4 was of wide and comprehensive meaning, that before the assignation Mr. Tennant had the sole interest in the whole beneficial rights under the policy, and that even after the assignation he retained some interest therein. He was accordingly of opinion that the proviso did not apply and that the appeal should be dismissed. Lord Fleming thought it impossible to say that between the date of the policy and the date of the assignation the deceased had no interest in the policy. He rejected the contention that the deceased could not have any interest in policy moneys which only arose on his death, and held that the property which passed on the death was the right to recover those moneys from the insurance company. Lord Moncrieff proceeded upon the footing that since the policy moneys were under the policy payable to Mr. Tennant's executors and were also payable to those executors under the assignation, the deed of assignation might be ignored and the matter dealt with on the footing that all beneficial interests remained undiverted from the granter and still formed part of his estate. Lord Carmont agreed with the Lord President.

Before your Lordships' House the argument of counsel for the appellants involved two steps. The first step, which was essential to the taking of the second, was this : that the property which was subject to the duty consisted of the policy moneys, i.e. of the cash payable and paid by the insurance company, and of nothing else. If that were true, as he contended it was, then, he argued (and this was the second step), that it must inevitably follow that the deceased never had and never could have an interest in the property

H. L. (Sc.)

1939

TENNANT
v.
LORD
ADVOCATE.

Lord Russell
of Killowen.

which passed on his death, because that property never was in existence in his lifetime.

For myself, I am not prepared to accept without some further consideration the correctness of the first step. Three authorities were cited as establishing it—namely, *Attorney-General* v. *Dobree* (1) ; *Attorney-General* v. *Robinson* (2) ; and *Inland Revenue* v. *Scott's Trustees.* (3) No doubt language is used in some of the judgments in those cases which might give colour to the view that what passed on the death was the cash, and not the policy or the value of the policy ; but in none of those cases was it material that any such question should be decided. Indeed it is not easy to see how the question can ever become material. The policy must, if valued, be valued as a matured policy and with reference to the solvency of the insurance company, with the result that the value of the policy will be the same as the value of the moneys payable thereunder. But I would wish to keep the question open in case it should ever hereafter be necessary to decide between the two alternatives.

Proceeding then upon the assumption in favour of the appellants that the duty is leviable upon the proceeds of the policy, do those proceeds fall within the proviso to s. 4 ? In my opinion they do not. I feel no doubt that the deceased had from the commencement of the policy's existence an interest, and for many years the sole interest, in the proceeds thereof. He could, before the assignation, have assigned or charged the entirety of those proceeds ; and even after the assignation he had a contingent interest therein by way of resulting trust of which (for what it was worth) he could have disposed inter vivos or by will. The word " interest " is a word capable of wide meaning, and I see no valid reason for limiting its scope in s. 4, as was suggested in the course of the argument. The case is really covered by the decision of Rowlatt J. in *Attorney-General* v. *Pearson* (4), and, agreeing as I do with that decision, I am of opinion that this appeal fails and should be dismissed.

(1) [1900] 1 Q. B. 442.
(2) [1901] 2 I. R. 67.
(3) 1918 S. C. 720.
(4) [1924] 2 K. B. 375.

LORD MACMILLAN. I agree.

LORD WRIGHT. I also agree.

Solicitors for appellants: *Allen, Edwards & Oldfield, for Mackenzie & Black, W.S., Edinburgh, and James & George Collie, Advocates, Aberdeen.*

Solicitors for respondent: *Sir John Houldsworth Shaw, Solicitor for England of Board of Inland Revenue, and Stair A. Gillon, Solicitor for Scotland of Board of Inland Revenue.*

[HOUSE OF LORDS.]

RADCLIFFE . . . . APPELLANT ;

AND

RIBBLE MOTOR SERVICES LIMITED . RESPONDENTS.

H. L. (E.)*

1939

Jan. 16, 17, 19 ; *Feb.* 23.

Master and servant—Common employment—Drivers of motor coaches in service of same employers—Coaches carrying parties to same destination—Return to garage—Death of one driver owing to negligence of another driver—Liability of employers.

R., a motor driver in the employment of the respondents, was engaged on a certain date, as were also other drivers of the same employers, in taking parties by motor coach from Liverpool to New Brighton. Thereafter they were to return to the respondents' garage at Bootle. R. had his own instructions from the respondents and it was left to himself to decide by what route he should return. On the return journey he, for some unexplained reason, stopped in a street in Liverpool and while standing near his coach he was knocked down and fatally injured owing to the negligence of another driver in the respondents' employment. In an action by R.'s widow under the Fatal Accidents Act, claiming damages on behalf of herself and her infant daughter, the respondents relied on the doctrine of common employment as excluding liability on their part :—

Held, that in regard to driving in the public streets the one driver was no more interested in the skill of the other driver in the same service than in that of drivers of other vehicles in whose vicinity he might happen to be ; that, for the purposes of the doctrine of common employment, the risk of injury in the streets by a vehicle driven by a fellow servant was not one of "the natural risks and perils incident to the performance of his "service" ; and, therefore, that the doctrine had no application in the particular case.

Per Lord Wright. For the doctrine of common employment to apply, the workmen concerned must be employed in common work, that is, work which necessarily and naturally, or in the normal course, involves juxtaposition, local or causal, of the fellow employees, and exposure to the risk of negligence of one affecting the other.

The Petrel [1893] P. 320 approved and applied.

Decision of the Court of Appeal [1938] 2 K. B. 345 reversed.

APPEAL from a decision of the Court of Appeal (1) reversing a decision of Hawke J.

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(1) [1938] 2 K. B. 345.

* *Present :* LORD ATKIN, LORD MACMILLAN, and LORD WRIGHT.

H. L. (E.)
1939
RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

The appellant, Mrs. Radcliffe, as the administratrix of Eric Charles Radcliffe, brought the action for the benefit of herself as widow and of her infant daughter against the respondents under the Fatal Accidents Act claiming damages for the loss of her husband, Eric Charles Radcliffe, whose death she alleged was caused by the negligence of the respondents' servant.

The deceased was a motor driver in the employment of the respondents, and on June 25, 1936, while he and other drivers in the respondents' service were engaged in taking parties from Liverpool to New Brighton, the deceased was on the return journey struck down by one Jones, another driver in the respondents' service, and so severely injured that he died on the same day. It was proved that the death of the deceased was caused by the negligence of Jones.

On the occasion in question, the deceased man, though he started with his coach in company with four other coaches of the respondents, went to the same destination, and was directed to return to the respondents' garage at Bootle, had instructions addressed to him individually. It was left entirely to his own discretion by what route he should return ; and actually he was returning independently and separately from the other four coaches, when he happened to stop for some unexplained reason. There was no evidence that he had had a breakdown. Jones, the driver of the other coach, was also returning independently and there was no evidence of any compulsion or order of the respondents which brought the coach driven by Jones to the spot where the deceased's coach had been brought to a standstill.

At the trial Hawke J., after finding that the accident was wholly due to the lack of care of Jones, and that there was no negligence on the part of the deceased, held that at the time of the accident the deceased and Jones were not engaged in common employment within the meaning of the doctrine of common employment, which therefore did not apply. He accordingly gave judgment for the plaintiff for damages under the Fatal Accidents Act and a sum as damages for the pain and suffering of the deceased ; and he further assessed the amount of compensation for the loss of expectation of life of the deceased at 500*l.*, but held that he could not, in the then state of the authorities, give the plaintiff judgment for that sum.

On appeal by the respondents, the Court of Appeal reversed the decision of Hawke J., holding that the two drivers were engaged in carrying out together the order of their employers, and that the doctrine of common employment applied.

The appellant appealed to this House.

Hon. Sir Stafford Cripps K.C., *W. Gorman K.C.*, *B. R. Rice-Jones* and *M. Turner-Samuels* for the appellant. It would be an extension of the very questionable doctrine of common employment if it were to be applied to the facts of the present case where the accident occurred, not on the employer's premises, but in the highway; it was in fact an ordinary street accident. The doctrine, which was said to be based on an implied term assumed to exist in 1842, cannot, we submit, be read into the modern relationship of master and servant. It certainly must be limited in some way. It may be that, where a workman is acting as mate to a fitter on the employers' premises, he may conceivably be taken to have contemplated that, if by a misuse of a tool by the fitter he is injured, he should be held to come within the doctrine as having undertaken the risk of carelessness on the part of the fitter, but such a case as that is very different from that with which we are now concerned. In *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (1) where it was held that a master is not responsible to his servant for injury occasioned by the negligence of a fellow servant in the course of their common employment, it was pointed out there by Alderson B. that the two men were engaged in a common service, the duties of which imposed a certain risk on each of them. Here it cannot be said that the two drivers were "engaged in a common "service"; each was at work independently of the other. Again, in *Bartonshill Coal Co.* v. *Reid* (2), and *Bartonshill Coal Co.* v. *McGuire* (3), all the workmen concerned were engaged in a common operation. As Lord Brougham said (1): "To bring the case within the exemption, there must be this "most material qualification, that the two servants shall be "men in the same common employment and engaged in the "same common work under that common employment": that must mean where the workmen, the injurer and the injured, are actually working together. The fact that the two workmen must, for the doctrine to apply, be engaged in one common object was again emphasized in *Waller* v. *South Eastern Ry. Co.* (2), and in *Morgan* v. *Vale of Neath Ry. Co.* (3), but it is to be observed that in the latter case, Erle C.J. in saying that the injurer and the injured person " were engaged "in a common employment and doing work for a common "object—namely, fitting the line for traffic," goes away from the true conception—namely, engaged in a common work. In *Lovell* v. *Howell* (4) it was laid down that the principle which exempts a master from liability for injury caused by the negligent act of a fellow servant or fellow workman, is that the servant must be assumed to have contemplated and tacitly assented to encounter the ordinary risks incident to the service or employment. But in that case the accident in respect of which the action was brought occurred while the injured person was leaving the employers' warehouse. In *Swainson* v. *North Eastern Ry. Co.* (5) Cotton L.J. said (6) that " it is a rule that where one member of an establishment "is injured by another member of it, the master is not "answerable." That obviously means where both are on the employers' premises, and that view is borne out by his judgment in *Charles* v. *Taylor, Walker & Co.* (7) In *Smith* v. *Baker & Sons* (8) where the workmen were in common employment this House took into consideration whether the injured man impliedly took the risk of injury, and held that the maxim volenti non fit injuria did not apply. *The Petrel* (9) is a direct authority for the view for which we

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(1) (1850) 5 Ex. 343.
(2) (1858) 3 Macq. 266.
(3) (1851) 3 Macq. 300.

(1) 3 Macq. 313.
(2) (1863) 2 H. & C. 102.
(3) (1865) 5 B. & S. 736.
(4) (1876) 1 C. P. D. 161.
(5) (1878) 3 Ex. Div. 341.
(6) 3 Ex. Div. 351.
(7) (1878) 3 C. P. D. 492, 497.
(8) [1891] A. C. 325.
(9) [1893] P. 320.

contend. There a collision occurred between two vessels belonging to the same owners, and it was held that, though the masters, officers and crew of each vessel had a common employer in the sense that both crews were making money for him, they were not in common employment in the sense that injury from the negligence of one crew was an ordinary risk of the service of the other, for the safety of the crew of one of the vessels did not depend on the skill and care of the other more than on the skill and care of the crews of vessels belonging to other owners. In *Burr* v. *Theatre Royal, Drury Lane* (1), Collins M.R. said (2): "The basis underlying the "doctrine of common employment in all the cases appears to "be that, under the circumstances, the injured person must "be taken to have accepted the risks involved by putting "himself in juxtaposition with other persons employed by the "same employer, whose presence is incidental to the occupation "in which he is engaged." That again presupposes juxtaposition on the employer's premises. In *Wilsons & Clyde Coal Co.* v. *English* (3) Lord Wright said (4): that "The well-"established, but illogical, doctrine of common employment is "certainly one not to be extended," and it would be to extend it greatly if it were to be applied to the circumstances of this case where there was no common work and where the fact that the two drivers were in the same employment had nothing to do with the stoppage of the cars in the street or with the accident which followed.

Sir Walter Monckton K.C. and *R. H. Norris* for the respondents. The question is whether the work in which the two drivers were engaged was "common work" within the meaning of the doctrine under consideration. We submit that it was, and that the doctrine excludes any liability on the part of the respondents. The decisions have clearly established this, that there is implied by law in a service contract that the employer shall not be bound to indemnify a servant against the negligence of a fellow servant engaged in the pursuit of the same general object, this immunity of the

(1) [1907] 1 K. B. 544.
(2) Ibid. 553.
(3) [1938] A. C. 57.
(4) Ibid. 79.

employer being based on the rule that the servant is taken to contemplate such a risk as one of the ordinary risks of the employment. In *Bartonshill Coal Co.* v. *McGuire* (1), Lord Chelmsford said it was not necessary " to define with any "great precision what was meant by the words 'common "'service' or 'common employment,' and perhaps it might "be difficult beforehand to suggest any exact definition of "them. It is necessary, however, in each particular case to "ascertain whether the servants are fellow-labourers in the "same work, because, although a servant may be taken to "have engaged to encounter all risks which are incident to "the service which he undertakes, yet he cannot be expected "to anticipate those which may happen to him on occasions "foreign to his employment." The test must be, is that which is being done in connection with the employer's business, or is it something foreign to the employment of the servant? The two drivers in this case were engaged in the common object of transporting passengers for their common employers, and therefore each had to take the risk of the perils of that work including that of negligence of a fellow-driver. In this case the collision causing the fatal injuries to the deceased driver took place by reason of the fact that the two men were in the same employment, the second man pulling up because he knew that the other car belonged to the same owners. A man taking service with motor proprietors must know, or must be taken to know, the possibility of risk of collision with cars belonging to them. In *Morgan* v. *Vale of Neath Ry. Co.* (2) Pollock C.B. said (3): " It appears to me "that we should be letting in a flood of litigation, were we to "decide the present case in favour of the plaintiff. For, if a "carpenter's employment is to be distinguished from that of "the porters employed by the same company, it will be "sought to split up the employees in every large establishment "into different departments of service, although the common "object of their employment, however different, is but the "furtherance of the business of the master; yet it might be

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(1) 3 Macq. 300, 307.
(2) L. R. 1 Q. B. 149.
(3) L. R. 1 Q. B. 155.

"said with truth that no two had a common immediate "object. This shows that we must not over refine, but look "at the common object, and not at the common immediate "object." Here the two men were engaged in a common purpose on behalf of the employers. As Lord Cranworth said in *Bartonshill Coal Co.* v. *Reid* (1)—approving the decision of the Supreme Court of Massachusetts in *Farwell* v. *Boston and Worcester Ry. Corporation* (2)—"When several workmen engage "to serve a master in a common work, they know, or ought to "know, the risks to which they are exposing themselves, "including the risks of carelessness, against which their "employer cannot secure them, and they must be supposed "to contract with reference to such risks . . . . It is not "necessary for this purpose that the workman causing and the "workman sustaining the injury should both be engaged in "performing the same or similar acts." Nor has it been laid down that the accident giving rise to a claim should have occurred on the employers' premises. As was said in *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (3): "a "servant, when he engages to serve a master, undertakes, as "between him and his master, to run all the ordinary risks of "the service, and this includes the risk of negligence on the part "of a fellow-servant, whenever he is acting in discharge of his "duty as servant of him who is the common master of both." The principle so stated applies exactly to the present case.

Hon. Sir Stafford Cripps K.C. replied.

The House took time for consideration.

1939. Feb. 23. LORD ATKIN. My Lords, this is an appeal from a decision of the Court of Appeal who reversed the decision of Hawke J. sitting at Liverpool in the Winter Assizes, 1937. The action was brought under the Fatal Accidents Acts against the respondents in respect of the death of the deceased man Radcliffe, whose death was caused by the now admitted negligence of one Jones. Both Radcliffe and Jones were in the

(1) 3 Macq. 266, 295.
(2) (1842) 4 Metcalf, 49; 3 Macq. 316.
(3) 5 Ex. 343, 352.

employment of the respondents. The respondents relied on the defence of "common employment." The learned judge thought that on the facts found the doctrine did not preclude the plaintiffs from recovering, and awarded damages. The Court of Appeal, taking a different view of the facts, held that the doctrine applied, and entered judgment for the defendants.

It is only necessary to deal shortly with the facts before discussing the application of the doctrine which is known to all concerned under the title "common employment."

The respondents are the owners of a number of motor coaches and motor omnibuses which they use for private hire and public transport. The two men mentioned above, Radcliffe and Jones, were drivers employed by them at their garage in Bootle. On April 24, 1936, a firm of transport agents agreed to hire from the respondents four coaches to seat 124 on June 25, 1936, to start from a café in Liverpool at 1.40 P.M., thence to the Cathedral and thence via Mersey Tunnel and Egremont to New Brighton. They were not to convey the party back. This order was eventually reduced to three coaches, one of which was driven by Jones. On May 27, 1936, the same firm of transport agents agreed to hire one coach to seat 32. The order was expressed to be for the Copmanthorpe Women's Association. The time, starting point and journey were substantially the same as in the first order, except that there was an express provision for "½-hour stay" at the Cathedral. This coach was on the day in question driven by Radcliffe. On the same day another order was given by the same firm for one coach to seat 31. It was expressed to be for the Copmanthorpe Church School. In all material respects it conformed to the other order of the same date.

On the day in question, June 25, the coaches left the garage. The drivers of the three coaches first mentioned received instructions to start at 1.10, the drivers of the two single coaches at 1.15. They all arrived at the café before 1.40, parked there and at 1.40 loaded their passengers and proceeded to the Cathedral. They seem to have stayed there about the same time and then proceeded by the same route to New Brighton. Radcliffe was leading and they seem to have kept as near one another as traffic permitted. On discharging the passengers at New Brighton the hire was finished. It was then the duty of the drivers to return to their garage at Bootle. They could choose their own route, but up to the Liverpool exit from the Mersey Tunnel there was only one available route. In Liverpool there were several routes and the drivers did not all adopt the same. Radcliffe took one of the recognized routes up William Brown Street. He stopped his coach in that street for some reason unknown, alighted, and was standing on the offside of the coach when he was crushed by the coach driven by Jones. Jones had been delayed in the tunnel, was deliberating which way to go, saw Radcliffe's coach standing, went up to it, stopped behind it to see what he had stopped for, then pulled out to get in front of it, and in passing close to it, inflicted the injuries on Radcliffe. It was suggested that there was some duty on Jones arising out of the contract of service to stop and attend to Radcliffe if Radcliffe's coach had stopped. The judge negatived any such obligation ; his finding in this respect is amply supported by the evidence and should be accepted. In dealing with the question of liability the trial judge negatived what he called "community of risk" in the respective employments of Jones and Radcliffe from the beginning of the return journey and at any rate from the exit from the Mersey Tunnel. From that moment he held these coaches were all engaged on independent operations. He thought, therefore, that neither of them had undertaken the risk at this stage of negligent or incompetent driving by the other.

The legal issue is whether on these facts the employers are protected from the plaintiff's claim by the doctrine of "common "employment." At the present time this doctrine is looked at askance by judges and textbook writers. "There are none to "praise, and very few to love." But it is too well established to be overthrown by judicial decision. Affirmed by several decisions of this House, it has been accepted by the Legislature, once expressly in the Employer's Liability Act, 1880, and subsequently as the foundation underlying the various Workmen's Compensation Acts. I will only refer to s. 1 of the Employer's Liability Act, which provides that where personal injury is caused to a workman by reason of, amongst other things, negligence of a person in the service of the employer who has duties of superintendence or of a person in the service of the employer to whose orders the workmen was bound to conform, the workman or his representatives "shall have the same "right of compensation and remedies against the employer "as if the workman had not been a workman of nor in the "service of the employer, nor engaged in his work."

We must therefore deal with this case upon the footing that there are conditions in which the law will not hold a master liable for injuries caused to a workman by the negligence of his fellow workman employed by the same master and engaged in a common employment with him. But the difficulty is, and always has been, to define the conditions in which the doctrine holds good. And this is largely due to the unsatisfactory statement of the supposed principles upon which the doctrine was based in the decisions which inserted it into the common law. It originated in the Court of Exchequer in *Priestley* v. *Fowler* (1), in a case in which the plaintiff had recovered damages at the Summer Assizes, 1836. The defendants had obtained a rule in a motion to arrest judgment in Michaelmas term, 1836. Cause had been shown in Hilary term, 1837, and judgment was given in Michaelmas term, 1837. The plaintiff's cause of action was that he was the servant of a butcher and had been injured by the negligence of his master in that he was directed to travel in a van which was overloaded and broke down. The action was in case, and it would appear that the plaintiff founded the duty to take care as arising out of an implied contract so to load the van as that the plaintiff should be carried safely. The plaintiff had given evidence at the trial that the master knew of the overloading, though there was no express averment of this in the declaration. The motion for arrest of judgment proceeded on the terms of the record. In judgment Lord Abinger called attention to the absence of this averment, and declined to decide what would be the law if it existed. It may be that in the interval between the argument and the judgment he had forgotten that counsel for the

(1) (1837) 3 M. & W. 1.

H. L. (E.)
1939
RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Lord Atkin.

defendant had admitted that the declaration did disclose this very fact. (1) Lord Abinger felt that he had to decide the case upon general principles, and was at liberty to look at the consequences one way or the other. Surveying them he was alarmed, for he found that if the master was liable he would be liable for the negligence of all his "inferior agents," e.g., to a footman for the negligence of his coachmaker, his harnessmaker or his coachman; to a domestic servant for the negligence of the chambermaid, the upholsterer, the cook, the butcher and the builder. A more remarkable medley of so-called "agents" it is difficult to conceive. Faced with the "absurdity" of these consequences the Court concluded that the master is not bound to take more care of the servant than he may reasonably be expected to do of himself. The servant is not bound to risk his safety in the service of his master; and in most cases in which danger may be incurred he is just as likely to be acquainted with the probability and extent of it as his master. In fact, to give a remedy to the servant would encourage him to omit the diligence to protect the master from the negligence of his fellow servants, which the Court considered a much better security against injury than any recourse against his master for damages could possibly afford. It is perhaps difficult to extract from this judgment any principle other than the negation of any implied contract by the master to be liable for the safety of his servant in respect of the matters complained of in the action. In *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (2), the Court of Exchequer developed the doctrine and in a judgment delivered by Alderson B. founded the immunity of the master upon an implied contract by the servant. Where two servants are engaged in a common service the duties of which impose a certain risk on each of them, the party injured knew when he engaged in the service that he was exposed to the risk of injury by the want of skill on the part of his fellow servant; and he must be supposed to have contracted on the terms that as between himself and his master he would run this risk. In that case the deceased workman was a railway servant in the employ of the defendants, and whilst travelling on the railway in pursuance of his service his train was run into by another train belonging to the same defendants owing to the negligence of the driver of the second train. Alderson B. illustrates his principle by assuming the case of two servants employed to drive the master's cattle to market and one injured by the negligence of the other, i.e., "while they are jointly engaged in a common service."

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(1) 3 M. & W. 4.

(2) 5 Ex. 343.

It is obvious that the illustration would support only a limited application of the principle enunciated, though whether the principle of an implied contract could have been maintained at all after the decision in *Smith* v. *Baker & Sons* (1), and its support of the recent discovery that volens and sciens do not mean the same thing, may be doubted. By 1858 Pollock C.B. had been so imbued with enthusiasm for the doctrine that in the case of *Vose* v. *Lancashire and Yorkshire Ry. Co.* (2), he said of the rule "laid down in this Court originally," "I believe "there was never a more useful decision, or one of greater "practical and social importance in the whole history of the "law." The language is less exuberant in the report in 2 H. & N. In 1856 there was argued in the House of Lords the case of *Bartonshill Coal Co.* v. *Reid* (3), an appeal from the Court of Session. It was heard before Lord Cranworth L.C., sitting as the only law Lord, who as Rolfe B. had been party to the decision in *Hutchinson's* case (4) already mentioned. He deferred delivering his opinion until the case of *Bartonshill Coal Co.* v. *McGuire* (5), a case arising out of the same accident, was heard in the House of Lords, which took place in 1858 before Lord Chelmsford L.C., Lord Brougham and Lord Cranworth. It is this case which has bound the English and Scots Courts since it was delivered, and is binding on this House. The facts were that two miners, Reid and McGuire, were being drawn up the shaft in the cage, when, owing to the negligence of the man in charge, the cage was not stopped in time, overturned, and the men were killed. The actions were by the widows and children of the deceased workmen, who by the decisions in Scotland had recovered reparation. The appeals were allowed. The grounds of Lord Cranworth's decision are not easily discerned. The first part of his speech seems to point to an opinion that the doctrine of respondeat superior cannot in principle apply to the demand of a workman in respect of injuries resulting from the negligence of a fellow workman when engaged in common work. Later (1), he places the exemption on what is, I think, now accepted as its true basis—implied contract by the workman. "When several workmen engage to "serve a master in a common work, they know, or ought to know, "the risks to which they are exposing themselves, including the "risks of carelessness, against which their employer cannot "secure them, and they must be supposed to contract with "reference to such risks." He agrees that the real question is what is common work, and says that it is not necessary that both workmen should be engaged in performing the same or similar acts. He cites as illustrations the driver and guard of a coach, the steersman and rowers of a boat, the driver of an engine or a train and the signalman. In *McGuire's* case (2) Lord Chelmsford adopts the implied contract. "It is necessary, "however, in each particular case to ascertain whether the "servants are fellow labourers in the same work, because, "although a servant may be taken to have engaged to "encounter all risks which are incident to the service which he "undertakes, yet he cannot be expected to anticipate those "which may happen to him on occasions foreign to his employ-"ment." He proceeds: "Where servants, therefore, are engaged "in different departments of duty, an injury committed by one "servant upon the other, by carelessness or negligence in the "course of his peculiar work, is not within the exception." An illustration of the Lord Chancellor's conception of what is not common work is afforded by his approval of the decision in the Court of Session of *M'Naughton* v. *Caledonian Ry. Co.* (3) where a man employed by the railway company as carpenter was engaged in repairing a railway carriage on a siding and was killed by the negligence of a driver also in the employ of the

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(1) [1891] A. C. 325.
(2) (1858) 27 L. J. Ex. 249; 2 H. & N. 728.
(3) 3 Macq. 266.
(4) 5 Ex. 343.
(5) 3 Macq. 300.

(1) 3 Macq. 295.
(2) Ibid. 307.
(3) (1857) 19 D. 271.

company in driving his engine so as to collide with the stationary carriage. The Courts had allowed the widow reparation. Lord Brougham agreed that the decision in that case might well stand with their decision. It is not surprising that in 1860 in the 2nd edition of Mr. Manley Smith's work on Master and Servant, which was published after the decision, the learned author should state at p. 135 that the application of the general principle to the circumstances of particular cases would probably yet give rise to considerable litigation and dispute and that the question who are fellow workmen was still unsettled. It seems desirable here to refer to the American case of *Farwell* v. *Boston Railroad Corporation* (1), a decision of Shaw C.J. in the Supreme Court of Massachusetts. His judgment was referred to by Lord Cranworth in terms of admiration as recognizing, and in the fullest manner adopting, the English doctrine. The judgment which is set out as an appendix to the report in 3 Macqueen at p. 316 has been received with terms of approval in other cases. My Lords, while appreciating the vigour and literary style of this judgment, I venture with respect to think that as an expression of legal principles it is far from praiseworthy. It proceeds on a fallacious proposition from first to last—namely, that the doctrine of respondeat superior only applies to strangers, that it has no application to the servants of the employer: and that a cause of action against the employer can only be based on contract. And as will be seen, if the report (2) is looked at, this was the only ground put forward by the plaintiff's counsel, who expressly disclaimed putting his case upon the general principle which renders principals liable for the acts of their agents. The Chief Justice repeats what I consider to be the very unconvincing argument of Lord Abinger, that the fact that a servant is an observer of the conduct of his fellow servants, can give notice of misconduct to his employer and leave the service, is much more effectual to secure the safety of all than a resort to the employer for damages. And (3) he has brought himself to consider that the rule of marine insurance that the underwriter is liable for loss

(1) 4 Metcalf, 49; 3 Macq. 316.

(2) 4 Metcalf, 49, 51.

(3) 4 Metcalf, 57.

occasioned by the negligence of the master or crew of the assured is a useful analogy to the supposed immunity of the master for negligence occasioned by one servant to a fellow servant. I do not derive assistance from this judgment.

Since the decision of the House of Lords various opinions have been expressed by the Courts as to the definition of the "common work." I strongly suspect that one cause of the difficulty has been the unsatisfactory statement of any principle on which the rule is founded. Some learned judges have approved the test suggested by Pollock C.B. of working "with "a common object." I myself find no help in this. I do not know whether it assumes a conscious object aimed at by both workmen alike, or both workmen and their employer ; and it is difficult to see how it falls short of the common object of assisting the employer to make a profit out of his business. This indeed seems to have been the view accepted by two members of the Court of Appeal in *Charles* v. *Taylor, Walker & Co.* (1) In that case the plaintiff workman was engaged by the defendants (brewers) to unload coals from a barge at their wharf. He was injured by the negligence of another servant of the defendants in moving barrels whereby a flap fell on the plaintiff and injured him. Thesiger L.J. thought that, where there was one common general object, in attaining which a servant is exposed to risk, the servant was not entitled to sue the master if he was injured by the negligence of another servant whilst engaged in furthering the same object. This perhaps records the highwater mark of the doctrine from the employer's point of view. Brett L.J. had enunciated a formula which he agreed might not be exclusively true. "When the "two servants are servants of the same master, and where the "service of each will bring them so far to work in the same "place and at the same time that the negligence of one in "what he is doing as part of the work which he is bound to do "may injure the other whilst doing the work which he is bound "to do, the master is not liable to the one servant for the "negligence of the other." This is obviously a much more limited statement than that of Thesiger L.J. It will be evident

(1) (1878) 3 C. P. D. 492.

in perusing the cases that the Courts have in many cases tried to determine the limits of the principle as an objective rule of law without having regard to its foundation in the implied contract of the workman. The principle had been expressed by Blackburn J. in 1864 in terms which were subsequently adopted in the Exchequer Chamber, and appear to me to state with as much precision as possible the true limits of the doctrine. In *Morgan* v. *Vale of Neath Ry. Co.* (1), a carpenter employed by a railway company as their servant to repair the roof of an engine shed was injured by the negligence of porters, also servants of the railway company, in moving an engine on a turntable so as to cause the plaintiff's scaffolding to fall. The Court held that it was a case where the doctrine of common employment applied. "The principle I take to be," said Blackburn J. (2), "that a "servant who engages for the performance of services for com- "pensation does, as an implied part of the contract, take upon "himself, as between himself and his master, the natural risks "and perils incident to the performance of such services . . . . "and . . . . where the nature of the service is such that as a "natural incident to that service, the person undertaking it "must be exposed to risk of injury from the negligence of other "servants of the same employer, this risk is one of the natural "perils which the servant by his contract takes upon himself "as between him and his master." This statement was accepted in terms by the Court of Exchequer Chamber (3) by Erle C.J., Willes, Byles and Keating JJ., and Bramwell, Channell and Pigott BB. Pollock C.B. interposed his opinion that what one had to look at was a common object, the furtherance of the business of the master, and not (as had been suggested by Bramwell B. arguendo) a common immediate object. With this exception the statement by Blackburn J. has the approval of all the judges of the common law courts at that date, and short of this House is authoritative. I only propose to deal with one further case: *The Petrel.* (4) In that case a collision had occurred in the Thames between two steamers, the *Petrel* and the *Cormorant*, both belonging to the same owners, owing to the

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(1) 5 B. & S. 570.
(2) Ibid. 578.
(3) 5 B. & S. 736.
(4) [1893] P. 320.

H. L. (E.)
1939
RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Lord Atkin.

admitted negligence of those navigating the *Petrel*. The *Cormorant* sank. In a suit for limitation of liability the claim of the master, officers and crew of the *Cormorant* for loss of their effects was disputed on the ground of common employment. Sir Francis Jeune P. held that the doctrine did not apply. He relied on the statement of the principle by Blackburn J. above set out and proceeded thus (1): "The "consideration that the risk of injury to the one servant is the "natural and necessary consequence of misconduct in the other "implies that the skill and care of the one is of special importance "to the other by reason of the relation between their services. "Tried by this principle, can it be said that the safety of the "captain of one ship of a company is in the ordinary and "natural course of things dependent on the skill and care of the "captain of another ship of the same company, or that injury "by the negligence of one is an ordinary risk of the service of "the other? In some cases it might perhaps: for example, it "might if all the ships of the company were in the habit of "meeting in the same dock, and the safety of each thus became, "in the ordinary course of things, dependent on the skill with "which the other was navigated. But in regard to navigation "on the high seas, or in the estuary of the Thames would a "captain of one ship of the General Steam Navigation Company "have more reason to be interested in the skill of a captain of "another ship of the company than in that of the masters of the "myriad other craft in whose vicinity he might happen to "navigate? By no reasonable supposition can it be imagined "that he would. I think, therefore, that these two captains "were not in common employment."

I adopt this reasoning which appears to me clear and sensible. I seek to apply it to the case where the judge has found, and, as I think, rightly, that the two drivers were proceeding independently through the streets of Liverpool though to the same destination. They might, indeed would, in the course of their employment meet in the same garage and, while there, be dependent on the skill with which each drove his vehicle. But in regard to driving in the streets of Liverpool the one was no

(3) [1893] P. 326.

H. L. (E.)
1939
RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.
Lord Atkin.

more interested in the skill of the other than in that of the drivers of the myriads of other vehicles in whose vicinity he might happen to drive. In other words, for the purposes of this doctrine, the risk of injury in the streets by a vehicle driven by a fellow servant is not one of "the natural risks and perils "incident to the performance of his service." If the doctrine applied here, I do not see why it should not apply to the case of drivers of cars let out on hire from different garages in different towns if employed by the same employer; or why the driver of a lorry stationed at Portsmouth should not be deemed to have contracted to bear the risk of injury from another lorry driven by a driver stationed at Newcastle who may happen to meet on the same road in the Midlands. This is implied contract run riot. I find no support for it in the *Bartonshill* case (1), indeed I think it is negatived by the instances given in the opinions of cases where the doctrine did not apply. I have no doubt myself that the members of the Court of Appeal if they had taken the same view of the facts as Hawke J. would have accepted the view of the law stated in *The Petrel* (2) and would not have interfered with the judgment. Agreeing as I do with the trial judge on the facts as well as the law, I think that the appeal should be allowed with costs here and below, and that his judgment in favour of the plaintiffs should be restored.

Really?

LORD MACMILLAN. My Lords, the question in this appeal is whether the respondents are liable in damages for the death of Eric Charles Radcliffe, one of their employees, who lost his life on June 25, 1936, through the admitted negligence of Hugh Jones, another of their employees.

The respondents do not dispute their general liability, on the principle of respondeat superior, for the negligence of their servants in the performance of their duties, but they claim to be exempted from liability in the present instance because, as they allege, the deceased and Jones, whose negligence caused his death, were "engaged in one common employment or "service" by and under the respondents.

(1) 3 Macq. 266, 300.

(2) [1893] P. 320.

The plea so advanced has raised important questions as to the scope and effect of what is known as the doctrine of common employment and as to its applicability to the peculiar circumstances of the casualty which befell the deceased. These circumstances have already been described in detail by my noble and learned friend Lord Atkin who has preceded me in addressing the House and I need not repeat them.

Historically the principle of the exception invoked by the respondents to the general rule of respondeat superior is derived from a legal theory of the contract of employment. Thus in *Hutchinson* v. *York, Newcastle and Berwick Ry. Co.* (1) Alderson B. said that "the servant must be supposed to have "contracted on the terms that, as between himself and his "master he would run this risk," that is, the risk of injury through the negligence of his fellow servant. The principle is more fully stated by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (2), as follows: "When the workman contracts to do "work of any particular sort, he knows, or ought to know, to "what risks he is exposing himself; he knows, if such be the "nature of the risk, that want of care on the part of a fellow-"workman may be injurious or fatal to him, and that against "such want of care his employer cannot by possibility protect "him. If such want of care should occur and evil is the result, he "cannot say that he does not know whether the master or the "servant was to blame. He knows that the blame was wholly "that of the servant. He cannot say the master need not have "engaged in the work at all, for he was party to its being under-"taken. Principle therefore seems to me opposed to the "doctrine that the responsibility of a master for the ill conse-"quences of his servant's carelessness is applicable to the "demand made by a fellow-workman in respect of evil resulting "from the carelessness of a fellow-workman when engaged in a "common work." In the judgment of Shaw C.J. of the Supreme Court of Massachusetts in *Farwell* v. *Boston and Worcester Railroad Corporation* (3), which was extolled by Lord Cranworth as recognizing and in the fullest manner adopting the English doctrine, the learned Chief Justice puts the matter thus: "Where several persons are employed in the conduct "of one common enterprise or undertaking, and the safety of "each depends much on the care and skill with which each "other shall perform his appropriate duty, each is an observer "of the conduct of the others, can give notice of any miscon-"duct, incapacity, or neglect of duty, and leave the service, if "the common employer will not take such precautions and "employ such agents as the safety of the whole party may "require." I shall cite only one other statement of the principle, this time from the judgment of Blackburn J., in *Morgan* v. *Vale of Neath Ry. Co.* (1) "That principle I take to be that a "servant who engages for the performance of services for "compensation, does, as an implied part of the contract, take "upon himself, as between himself and his master, the natural "risks and perils incident to the performance of such services; "the presumption of law being that the compensation was "adjusted accordingly, or, in other words, that these risks are "considered in his wages."

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(1) 5 Ex. 343, 351.
(2) 3 Macq. 266, 284.
(3) 4 Metcalf, 49; 3 Macq. 316.

It will thus be seen that the immunity of an employer from responsibility for injury sustained by one of his workmen through the negligence of a fellow workman is regarded as an implied term of the contract of employment, by which is meant that the law imports this term into the contract although the contract says nothing about the matter. The law is chary of implying in contracts terms which the parties themselves have not thought fit to express, and will not do so unless the implication is necessary in order to give effect to the intention of the parties as gathered from the nature and terms of their expressed contract. The passages I have quoted disclose the grounds on which the judges of England and the United States justified the importation into the contract of employment of the implication that the servant must be presumed to have accepted the risk of his fellow servant's negligence. Whatever validity these grounds may have possessed a hundred years ago, it is manifest that in these present days of large scale industry they have no foundation whatever in fact. The assumed facts are

(1) 5 B. & S. 570, 578.

nowadays a sheer fiction. Yet the rule of law persists, though substantially mitigated by legislation, notwithstanding that its original ratio has long ceased to be regarded as tenable. It is one of the ironies of the law that the decisions in the *Bartonshill Coal Co.'s* cases (1), which affirmed the doctrine of common employment as part of the common law of England, should have been pronounced in appeals from Scotland, thereby fastening upon the law of Scotland a principle as distasteful as it was alien to Scottish jurisprudence.

The danger attendant on all doctrines which are founded on presumptions, implications or fictions originally thought to be equitable is that they are apt to be extended by a process of logical development which loses sight of their origin and carries them far beyond the reach of any such justification as they may have originally possessed. This has been the case with the doctrine of common employment as numerous decisions cited to your lordships have plainly shown.

It is therefore essential in a case such as the present, where the doctrine is invoked in circumstances of a quite exceptional character, to examine carefully whether the case falls within the principle upon which the doctrine is professedly based.

One thing is clear. It is not enough for the doctrine to apply that the negligent employee and the injured employee should be in the service of a common master. They must be serving him in a common employment or, as it was put by Lord Cranworth, "engaged in a common work." The chauffeur who drives his master to the works is not in a common employment with his master's employees in the works, though they have a common employer. In the ordinary case of common employment the nature of the employment is such as to bring the employees into association with each other in carrying on some activity in common, and it is from this association that there arises the risk that one of those so engaged may be injured by the negligence of another also so engaged.

Now in the present case, an important part of the business of the respondents is to hire out coaches for the conveyance of parties on excursions. The destinations of these excursions may

(1) 3 Macq. 266, 300.

be as diverse as the points of the compass. Each hire is a separate enterprise and it is of the essence of the work of the respondents' coach-drivers that each shall go upon the errand assigned to him which in the ordinary case will take him away from the only place where he is associated with his fellow employees, namely, the garage where the respondents house their coaches. The drivers are in common employment to this extent, that they all drive coaches belonging to the same employer and are thus all engaged in the conduct of his business, but the nature of their employment is not to bring them into association in carrying on their work but to dissociate them. Their work involves their dispersal, not their collaboration. It is true that by a coincidence the deceased driver in the present case happens, on the day when the accident befell him, to have been employed in conveying a party to the same place as that to which the respondents' other driver, Jones, was also conveying a party. But that was a mere chance. They were separate hires and separate excursion parties and that the one empty coach on its way back to the garage should fall in with the other empty coach also on its way back to the garage was quite fortuitous.

I accept the guidance given by Lord Chelmsford L.C. in *Bartonshill Coal Co.* v. *McGuire.* (1) " In general," says the Lord Chancellor, "by keeping in view what the "servant must have known or expected to have been involved "in the service which he undertakes, a satisfactory conclusion "may be arrived at." The respondents' drivers in undertaking service with them must be taken to have known that in driving their coaches to various destinations in town and country they would be exposed to the ordinary risks of road transport, but to my mind it is absurd to suggest that they must be taken to have "expected " that if they were involved in a road accident it might turn out that the party at fault was a driver also in the respondents' service. The chance was incalculable ; it was too remote to be within any reasonable estimation by the respondents' servants of the risks undertaken by them on entering their employment. I decline to read into the deceased's contract

(1) 3 Macq. 300, 308.

of employment with the respondents the implication that he undertook any such risk, and I am consequently of opinion that the doctrine of common employment is inapplicable to the present case.

I find support for this view in the case of *The Petrel* (1) where the President, Sir Francis Jeune, dealt with the analogous case of a collision in the Thames between two vessels belonging to the same owners. The collision was found to be due to the negligent navigation of one of the two ships, but the fact that the captain and crew of the innocent vessel had a common employer with the captain and crew of the negligent vessel was held to be no bar to a claim by the former, on the ground that the two captains and crews could not be said to have been engaged in a common employment within the meaning of the doctrine. Adopting as tests phrases used by Shaw C.J. in *Farwell's* case (2) and by Blackburn J. in *Morgan's* case (3), the learned President expressed the opinion that the chance that two vessels involved in a collision on the high seas or in the estuary of the Thames should happen to belong to the same owner was not a risk naturally incident to the performance of the duties of the respective captains and crews, and that the risk of injury from such a collision was not a risk which in the ordinary and natural course of things would ever be contemplated as a risk of the service. I agree entirely with the reasoning of the learned President and regard it as most apposite to the present case. I am accordingly of opinion that the appeal should be allowed and the judgment of Hawke J. restored.

LORD WRIGHT. My Lords, the deceased man, who was in the respondents' employment, having been killed by the negligence of another servant of the respondent in the course of his service, the only defence that was raised is that of common employment. Hawke J. held that the defence failed, but his judgment was reversed by the Court of Appeal.

Before examining the facts, it will be necessary to attempt to define as precisely as possible the nature and limits of the

(1) [1893] P. 320.
(2) 4 Metcalf, 49; 3 Macq. 316.
(3) 5 B. & S. 570, 578.

Lord Wright.

doctrine of common employment. I take as the leading case or cases which bind this House *Bartonshill Coal Co.* v. *Reid* (1) and *Bartonshill Coal* v. *McGuire* (2) which stated not merely the general principle that an employer is not liable to an employee for acts and defaults of a fellow employee in the course of the service and the considerations on which it was based, but also the main limitations of that principle. The essential question in this appeal is to ascertain what is the limitation relevant to this case and to see if the facts fall within the principle as so limited. The relevant limitation, in my opinion, is that the rule does not apply where the injured man and the negligent co-employee are not engaged in the same common work or are not fellow labourers in the same work or are engaged in different departments of duty. This question, it has been pointed out by decisions of this House, may raise difficult problems in particular cases.

In order to understand the *Bartonshill* cases (1) and (2), it is necessary to refer to the earlier decisions on the question. In 1837 *Priestley* v. *Fowler* (3) came before the Court of Exchequer. The plaintiff, who was employed by a butcher, had been injured —his thigh had been fractured—by the breakdown of the cart in which he was engaged in delivering the meat. The declaration alleged that the accident was due to the neglect of the defendant. The plaintiff gave evidence that the van was overloaded with the knowledge of the defendant, his employer. The jury found for the plaintiff and there was a motion in arrest of judgment on the ground that the defendant was not liable in law in the circumstances stated in the declaration.

Lord Abinger indignantly rejected the claim. He said that the action was unprecedented and if the master were held liable to his servant in that action the principle of liability would carry them to an alarming extent. He gave as instances the case of the footman being injured by the negligence of the coachbuilder, or the harness maker, or the coachman. In these and other instances he was confusing the position of an independent contractor with that of a servant. And what the declaration

(1) 3 Macq. 266.
(2) 3 Macq. 300.
(3) 3 M. & W. 1.

alleged was neglect by the defendant of proper care. Lord Abinger also instanced the cases of the servant being injured by the negligence of the chambermaid in putting him in a damp bed, or by the upholsterer sending a crazy bed, or by the cook not cleaning the copper pots, or by the butcher supplying bad meat. These instances seem to show personal apprehensions rather than any principle, but he seems to justify the rule on the ground that the master is not bound to take more care of the man than he may reasonably be expected to take of himself.

If, as was alleged in the declaration and found by the jury, the master was personally negligent in overloading the van, he would clearly in modern law be liable to the injured servant, as indeed he should have been on Lord Abinger's own statement that the master is bound to provide for the safety of the servant in the course of his employment, to the best of his ability. Lord Abinger's reason that the man was just as likely to be acquainted with the danger as his master, and could decline any service if he apprehended danger, if it is meant to invoke the principle volenti non fit injuria, is not consistent with *Smith* v. *Baker & Sons* (1), where it was held that the fact that a man goes on working is, for obvious reasons, not conclusive that he voluntarily takes the risk, because he may do so rather than lose his job. But the fact that the butcher's boy, or indeed any particular employee, could know as well as the master, is at the lowest questionable, and if applied to wider industrial operations such as those of modern times is absurd. Finally, Lord Abinger's explanation, that to allow such actions would be an encouragement to a servant to omit the due diligence and caution, which he is bound to exercise for his master, to guard against the negligence of his fellow employees, and that these are a better security for the man's safety than a claim for damages against the master, seems to go beyond the limit of judicial cognizance and to be difficult to reconcile with ordinary experience or common sense.

But *Priestley* v. *Fowler* (2) was accepted in a case five years later by the plaintiff's counsel as well as the judge who decided the case as being good law. That was in *Farwell* v. *Boston and*

(1) [1891] A. C. 325.

(2) 3 M. & W. 1.

Worcester Railroad Corporation (1), a case tried in the Supreme Court of Massachusetts before Shaw C.J., who delivered an elaborate judgment. The plaintiff, employed by the defendant company as the conductor of a train, had been injured in a collision due to the negligence of a switchman also employed on the line by the defendant company. The action was laid in trespass on the case. The judgment which was commended by Lord Cranworth in the *Bartonshill* case (2) is carefully composed and lucidly expressed. But I think it is here necessary to analyse the reasoning on which it proceeds. The Chief Justice did not deny that the master owed some duty to his servant, but limited that duty (in addition to the master's own personal duty in the conduct of the work) to a duty to answer for failure to use due diligence in the selection of competent and trusty servants and to furnish them with proper means. He accepted that the principle respondeat superior required an employer to answer in tort to a stranger for his employee's negligence, but held that a different principle applied where it was an employee who was so injured, because the rights as between employer and employee were regulated by contract, express or implied, so that there was no room for an indemnity in tort against the negligence of a fellow servant. I am not clear if he based that conclusion on the now exploded doctrine that where there is a contract between parties there is no room for liability in tort; in modern law it is realized that a duty may arise out of a relationship based on contract with a consequent liability for a breach of that duty, which I take to be the legal basis for many cases of liability in negligence and for such liability as now exists between employer and employee. If on the other hand he held that there was in the cases of this nature an exception to the rule respondeat superior, he must have found the exception in the implied terms of the contract of employment. I think his conclusion was the latter, because he says that the relations between employer and servant must in contemplation of law be presumed to be regulated by contract express or implied. He based this general conclusion, as he said, on considerations of public policy and general convenience and because the rule was best calculated to promote the benefit of all parties concerned. Now, we have always been told that public policy is a dangerous ground of judgment, and it is clear that the reason and grounds on which a judge in effect usurps the function of the Legislature should be explicitly set forth. If the public policy which Shaw C.J. had in mind was that the welfare of the community was best promoted by reducing the charges on industry, or saving the master's pocket in particular in respect of compensation to workmen injured or killed, he might at least have considered the other side of the picture, the crippled workman deprived by the injury of the means of earning his living, the widow and orphans bereaved of their breadwinner. But the Chief Justice did not explain very clearly what public policy he meant to give effect to. He instanced the case of marine insurance as a case where underwriters could not excuse themselves on the ground that the loss was caused by the negligence of the assured's servants. But that is a very different contract. The condition of liability is the loss itself and negligence is immaterial by reason of the rule of causa proxima. It is no true analogy. At one place he seems to emphasize that each workman has better means of providing for his own safety by observing the conduct of those with whom he is employed and can give notice of any incapacity to the master and if necessary leave the employment and that this is a better security than a claim for damages (which seems to me a very fallacious idea), but, later, he rejects that explanation in so far as it depends on the servant being in the same department of duty and says that such a distinction was not the ground of the exemption from the scope of the rule respondeat superior which he holds was that, though there was an implied contract to indemnify the servant, it was limited to the matters already stated. There was, he also held, no liability in tort because the employee and employer were not strangers. He said that the risks incident to the service included the risk of another servant's negligence, which was distinctly foreseen and provided for in the rate of compensation. This latter seems to me to be as hard to comprehend as the idea of public policy when it is considered how little bargaining power a workman possessed, but it seems to assume that the men were working in one department of duty. What, however, seems to me to be most important to note for purposes of this case is that it was the Chief Justice's view that it was extremely difficult to distinguish what would constitute one department and what a distinct department of duty, and hence any such distinction must be disregarded. This was a point which was dealt with differently by the House of Lords in the *Bartonshill* cases. (1) It may not perhaps be unfair to say that the judgment depends at least in part on a very questionable view of public policy, and on a view of the relation of contract to tort, which modern law has rejected.

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(1) 4 Metcalf, 49; 3 Macq. 316.

(2) 3 Macq. 266, 297.

A few years later, in 1851, the principle of *Priestley* v. *Fowler* (2) was applied, or rather extended, in *Hutchinson* v. *Great Eastern Ry. Co.* (3) *Farwell's* case (4) does not appear to have been cited. In *Hutchinson's* case (3) a railway guard, while acting as such on the company's train, was injured by a collision due to the negligence of an engine driver of another train employed by the same company or of the drivers of both engines. The decision was, it seems, based on the idea that the workman must be taken to have contracted on the terms that, as between himself and his master, he would run the risk of his fellow servant's negligence as one of the ordinary risks of the service, even though the two servants were not engaged in any common act of service. Hence the Court treated as immaterial the question whether or not the accident was due to the negligence of the driver of the plaintiff's train, or of the other driver or of both. Apart from the assertion that there is such an implied term, I am not clear on what principle the decision is based, except perhaps that negligence on the part of a fellow servant is treated as on the same footing, quoad the master's liability, as negligence of the man himself causing injury to him. The Scottish courts, however, refused to accept the doctrine of common employment. I note in particular *McNaughton* v. *Caledonian Ry. Co.* (5), another railway case, where the company was held liable notwithstanding the plea. The Lord

(1) 3 Macq. 266, 300.
(2) 3 M. & W. 1.
(3) 5 Ex. 343.
(4) 4 Metcalf, 49; 3 Macq. 316.
(5) 19 D. 271.

H. L. (E.)
1939
RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Lord Wright.

Justice Clerk, repudiating that there was any such rule in Scotland, said that, if a master was responsible to strangers for his servant's negligence, a fortiori should he be responsible to his own servants in the like case and shrewdly added that to say that each workman undertakes all risks of accidents which might be caused to him by perhaps 1,000 workmen employed on a railway, was opposite to reason and justice. The House of Lords in the *Bartonshill* cases (1) rejected and overruled the view so expressed, but they reserved their opinion in regard to the case itself, which they said might stand with their decision. I think their Lordships were referring to what was said by the Lord Ordinary in his judgment on the subject of distinct departments of work which it seems had been regarded as immaterial both in *Farwell's* case (2) and in *Hutchinson's* case. (3) As instances of distinct departments of work the Lord Ordinary mentioned the cases of a dairymaid when taking the milk to the house being run over by the coachman, of a painter working on a high ladder knocked down by the gardener, of a ploughman employed by a railway being injured while working in a field near the line by the negligence of the railway servants on a passing train. Where persons were working side by side in a common operation, the Lord Ordinary said, it might be possible to imply the consent to undergo the risk, but it was a different matter where there was a universal undertaking extending to hundreds of persons in widely different places. In that case a carpenter employed by the railway company was working on a railway carriage in a siding. The carriage was run into in consequence of the negligence of the driver of a train belonging to the same company and the carpenter was injured. The Lord Ordinary held that the carpenter belonged to a different department from the locomotive department and was entitled to recover.

The decision, which, I have said, was specially reserved for further consideration in the *Bartonshill* cases (1) by this House, is peculiarly important in the present appeal which depends on whether the man who was killed and the man who was negligent, being both employed by the respondents, were both employed in the same departments or in the same work or common task. As will appear, this House carefully limited the rule to cases where the question can be answered that the men were so employed. This was in the *Bartonshill* cases (1), which may be considered as if they were one.

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(1) 3 Macq. 266, 300.
(2) 4 Metcalf, 49; 3 Macq. 316.
(3) 5 Ex. 343.

The facts were that the two miners who were killed met their death through the negligence of the man working the cage which brought them from the bottom of the pit to the surface. It was held by this House, reversing the Scottish Courts, that the defence of common employment was good. Their Lordships accepted the view that the rule depended on an implied contract on the part of the workman, which they treated as involving a special exemption from the principle of respondeat superior. But Lord Brougham said that to bring a case within the exemption there must be "this most material qualification "that the two servants shall be men in the same common "employment and engaged in the same common work under "that common employment." Lord Cranworth said the real question in general was what was common work ? He said it was not necessarily the same or similar acts. The instances he gave all involve some juxtaposition or interconnection in working, such as steersman and rower, driver and guard of stage coach and so on. He included in the category of such work the case before him (that of the work of the miners and the lift man), and also that of the conductor of a train and a switchman.

Lord Chelmsford, in an important passage (2) cited as an authoritative statement of the rule by Lord Loreburn in *Coldrick* v. *Partridge, Jones & Co.* (3) said : "It is necessary, "however, in each particular case to ascertain whether the "servants are fellow-labourers in the same work, because, "although a servant may be taken to have engaged to encounter "all risks which are incident to the service which he undertakes, "yet he cannot be expected to anticipate those which may "happen to him on occasions foreign to his employment.

(1) 3 Macq. 266, 300.
(2) 3 Macq. 307.
(3) [1910] A. C. 77, 80.

"Where servants, therefore, are engaged in different departments of duty, an injury committed by one servant upon the "other, by carelessness or negligence in the course of his "peculiar work, is not within the exception, and the master's "liability attaches in that case in the same manner as if the "injured servant stood in no such relation to him." He added that there might be difficulty in deciding whether a common employment existed, but, by keeping in view what a servant must have known, or expected, to be involved in the service which he undertakes, a satisfactory conclusion may be arrived at. He held that in the case before him there was one common operation, that of getting coals from the pit, and that all necessary incidents were included in it, including the very act in question. Lord Chelmsford said that *McNaughton's* case (1) might be sustained without conflicting with the English authorities on the ground that the workmen in that case were engaged in totally different departments of duty.

I have been attempting to elucidate what is the principle of law and what are its limits. I ventured in *Wilsons and Clyde Coal Co.* v. *English* (2) to express some criticism of the doctrine, which I cannot help regarding as an arbitrary departure from the rules of the common law based on a prejudiced and one-sided notion of what was called public policy, and sanctioned by no previous authority. Your Lordships have been invited by counsel for the appellants to say that the rule is based on industrial and social conditions which have changed. Therefore, it is said, as it is the duty of the common law to mould and adapt itself from time to time so as to do justice under new and changing conditions, this is a case in which that duty should be fulfilled. It is indeed true that the common law is flexible and progressive, but it is so only subject to definite limitations. One is that this House is bound by its own decisions. It may overrule in a proper case the decision of a lower Court, even a decision which has stood and has been acted upon for a long series of years. It may also refuse to act upon expressions of opinion or matters of observation stated in opinions of members

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(1) 19 D. 271.

(2) [1938] A. C. 57, 80.

Lord Wright.

of the House. But in a matter of clear and precise decision such as the doctrine of common employment, it is well settled by established authority that the decision of the House is final and that the rule can only be changed by the Legislature. In this particular matter, the rule has been reaffirmed by this House in several cases to which I have referred or shall shortly refer. It has also been clearly recognized in certain remedial legislation, namely, the Employers' Liability Act, 1880, which, subject to serious qualifications, made some specific exceptions from the rule which is expressly recognized. The rule may also be said to be implicitly recognized in the Workmen's Compensation Acts. But these Acts do not give the workman or his dependants the same benefits as he or they would have in proper cases if the rule did not exist, though they also give the employee the option of proceeding at common law as an alternative remedy, when he has a right at common law. This House cannot usurp the function of the Legislature in a matter of this nature.

But these considerations make it more important to state the rule precisely and to determine its exact limits, which have sometimes been in danger of being overlooked. I have already stated the limit material to this appeal, as expressed in the decision of this House. There are also other limitations which this House, while affirming the rule, has had at times to reaffirm. Thus in *Johnson* v. *Lindsay* (1), this House was constrained to reverse a decision of the Court of Appeal and to hold that it was not enough that the men were engaged in a common general operation or work, but they must also be employed by the same employer. In *Wilsons and Clyde Coal Co.* v. *English* (2), this House reaffirmed the principles laid down in this House in the *Bartonshill* cases (3) and other decisions that the doctrine of common employment did not extend to excuse lack of due diligence on the part of the employer in the threefold duties of selection of competent employees, provision of proper appliances and the provision of a proper system of working. In that case this House affirmed the view of the Court of Session and

(1) [1891] A. C. 371.
(2) [1938] A. C. 57.
(3) 3 Macq. 266, 300.

H. L. (E.)

1939

RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.

Lord Wright.

overruled decisions to the contrary effect of the Court of Appeal. On the same principle it has been held that the doctrine of common employment does not apply to failure of an employer to fulfil an obligation which is personal to him, such as that under the Factory Acts, though the employer does not, and indeed cannot, perform the obligation personally or otherwise than by employees: see, for instance, *Lochgelly Iron, &c., Co.* v. *M'Mullan* (1). These are clear limitations of the scope of the doctrine. But the limitations which I have explained and which for purposes of this opinion I wish to emphasize are based on the fundamental principle that there must be an actual contract between the employer and employee so that it may be possible from the nature and circumstances of that contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow employees. On this footing it has been held that where there was no contract at all, as in the case of a workhouse inmate doing work which he was ordered to do (*Tozeland* v. *West Ham Union* (2)), or a pilot employed under compulsion of law (*Smith* v. *Steele* (3)), there is no basis of actual contract on which to found the implied term. Blackburn J. in delivering judgment in the latter case referred to *Indermaur* v. *Dames* (4), as a case in which the law could not imply the term. The decisions which have held that a volunteer may be met by the defence of common employment have not come before this House. If they are right, they can only be considered as special exceptions to the settled general rule that the basis of common employment is a contract, as Blackburn J. specifically said in *Smith* v. *Steele.* (3) If what was said by the Master of the Rolls (Sir R. Henn Collins) in *Burr* v. *Theatre Royal, Drury Lane* (5), was meant to contradict this idea, and to place the doctrine of common employment on an abstract rule or fundamental principle of law applicable without regard to circumstances and incidental to the bare relationship of master and servant, I cannot agree with him for reasons already sufficiently made clear. On the previous page of his judgment, however, the Master of the Rolls stated the basis of the rule to

(1) [1934] A. C. 1.
(2) [1906] 1 K. B. 538.
(3) L. R. 10 Q. B. 125.
(4) (1867) L. R. 2 C. P. 311.
(5) [1907] 1 K. B. 544, 555.

be that "under the circumstances, the injured person must be "taken to have accepted the risks involved by putting himself "in juxtaposition with other persons employed by the same "employer, whose presence is incidental to the occupation in "which he is engaged, and cannot complain of that which is a "necessary or reasonable incident of the situation in which he "has voluntarily placed himself."

This clearly recognized that the extent of the fictitious or imaginary term depends on the circumstances of the particular employment. It agreed in substance with the language of Blackburn J. in *Morgan* v. *Vale of Neath Ry.* (1), affirmed by the Exchequer Chamber. (2) Blackburn J. said (3): "There are "many cases where the immediate object on which the one "servant is employed is very dissimilar from that on which the "other is employed, and yet the risk of injury from the negli- "gence of the one is so much a natural and necessary conse- "quence of the employment which the other accepts, that it "must be included in the risks which are to be considered in "his wages." I think the words "natural and necessary" are more accurate than those of the Master of the Rolls, "necessary "*or* reasonable." I construe Blackburn J.'s words as meaning "necessary in the normal course of things," having regard to the service undertaken. I may, however, note in passing that even Blackburn J. repeats the old and erroneous idea that the workman considers this risk in his wages, which, oftener than not, as most people would agree, may be on the limit of bare subsistence. Brett L.J. expresses not quite so accurately the same general idea as Blackburn J. in his formula "where the "service of each will bring them so far to work in the same "place and same time that the negligence of one" may injure the other. It is noteworthy that Brett L.J., in *Charles* v. *Taylor, Walker & Co.* (4), says "will bring" not "may bring." He is thinking of what is natural and necessary, not merely accidental. We are thus brought back to the language of the leading case, the *Bartonshill* cases (5), by which, as Lord Watson said in *Johnson* v. *Lindsay* (6), the doctrine was for the first time "fully

(1) 5 B. & S. 570.
(2) L. R. 1 Q. B. 149.
(3) 5 B. & S. 580.
(4) 3 C. P. D. 492, 496.
(5) 3 Macq. 266, 300.
(6) [1891] A. C. 383.

H. L. (E.)
1939
RADCLIFFE
v.
RIBBLE
MOTOR
SERVICES,
LD.
Lord Wright.

"explained and reduced to its proper limits." I am here merely concerned with "the proper limits" or rather one particular limit. It is clear that the phrases found here and there in judgments to the effect that the doctrine applies wherever two or more workmen are working for one master, for no other common end than to make money for him, cannot be regarded as correct since the *Bartonshill* cases. (1) Perhaps such inaccuracy is natural enough where the Courts have to give effect to a vague and unreal figment of an implied term. It is easy to generalize and ignore limits which arise on the facts of the case. It is difficult sometimes to fit a factual qualification on a fictitious contract. But it is clear on the authorities in this House that there is always the limit, however expressed, that it must be the same work in which the workmen are employed. They must be employed in common work, that is, work which necessarily and naturally or in the usual course involves juxtaposition, local or causal, of the fellow employees and exposure to the risk of the negligence of one affecting the other. According to the cases the nexus may be some general undertaking, which, however large it may be, can be regarded by the Court as a unit, as a colliery was regarded in *Wilson* v. *Merry* (2), where it was held that there was common employment between the miner and the works managers, notwithstanding the difference in grade and responsibility between them; similarly in the navigation of a ship as in *Hedley* v. *Pinkney* (3), where the common employment was between the master and the seaman. The inter-dependence of the employees who are all engaged in the same work is obvious in such cases. Again, it has been held that there is employment in common in regard to the working of a railway system at least so far as working on the lines and adjoining premises is concerned, though the exception recognized or reserved in *McNaughton's* case (4) must not be overlooked. I need not detail the instances which appear in the cases of which many have been cited in argument. It is indeed true that with one exception there does not appear to be any reported case in which the defence of

(1) 3 Macq. 226, 300.
(2) L. R. 1 H. L. (Sc.) 326.
(3) [1894] A. C. 222.
(4) 19 D. 271.

H. L. (E.)

1939

RADCLIFFE *v.* RIBBLE MOTOR SERVICES, LD.

Lord Wright.

common employment has failed. There may be many explanations of that, but the most likely explanation may be that normally the negligence which caused the trouble occurred in the normal conditions of the trade which necessarily brought the men into local or at least causal proximity. It is true, as Lord Chelmsford said in the *Bartonshill* case (1), that there may be difficulty in deciding the question whether it was the same work on which the men were engaged. But all the same the question is vital, especially in the more complex organizations of industry in modern times.

It is easy to give clear instances where men employed by the same employers are not engaged in common work. A great industrial concern may operate collieries, blast furnaces, steel works, engineering shops. It is not possible to say that the miner is in common employment with the artificer in the engineering shop. The question may not arise in such cases because the different men are not likely to come into relation, but they illustrate the principle. In the same way different works of a large concern may employ different lorry drivers, two of whom in the course of their employment may collide in the Home Counties through the negligence of one driver and thus the other driver may be injured, the one it may be supposed carrying material from one of the company's factories in Cheshire, the other from one of their factories in Wales. That, in my opinion, would not be a case of common employment. Let me take a simpler case. A chain store firm may have two branches in the same town or in adjoining towns. An errand boy employed in one branch may be run over, while doing his errands in the street, by the negligence of the driver of a van working in the employment of the other branch. That again would not, in my opinion, be a case of common employment. Instances might easily be multiplied, but these may suffice to illustrate the principle.

The one case to which I referred in which the defence failed is *The Petrel.* (2) The soundness of the decision of Sir Francis Jeune, P., in that case has, so far as I know, never been questioned and in my opinion the case was well decided. Two

(1) 3 Macq. 300, 307.

(2) [1893] P. 320.

vessels the *Cormorant* and the *Petrel*, both owned by the General Steam Navigation Company, collided in the Thames. The *Petrel* was found alone to blame. To claims by the crew of the *Cormorant* for damage they had suffered the plea of common employment was set up, because, it was said, they and the crew of the *Petrel* were both employed by the same master. Sir Francis Jeune held that the plea failed. His conclusion is stated thus (1) : "The consideration that the risk of injury to the "one servant is the natural and necessary consequence of "misconduct in the other implies that the skill and care of the "one is of special importance to the other by reason of the "relation between their services. Tried by this principle, can it "be said that the safety of the captain of one ship of a company "is in the ordinary and natural course of things dependent on "the skill and care of the captain of another ship of the same "company, or that injury by the negligence of one is an "ordinary risk of the service of the other ? In some cases it "might perhaps ; for example, it might if all the ships of the "company were in the habit of meeting in the same dock, and "the safety of each thus became in the ordinary course of things, "dependent on the skill with which the other was navigated. "But in regard to navigation on the high seas, or in the estuary "of the Thames, would a captain of one ship of the General "Steam Navigation Company have more reason to be interested "in the skill of a captain of another ship of the company than "in that of the masters of the myriad other craft in whose "vicinity he might happen to navigate ? By no reasonable "supposition can it be imagined that he would. I think, "therefore, that these two captains were not in common "employment."

I think that passage admirably expresses and applies the limit on the rule laid down in the *Bartonshill* cases. (2) If the risk from the fellow servant's negligence is accidental, as in the facts stated by Sir Francis Jeune, and not incidental to the employment, if the men are engaged to act on independent jobs which do not necessarily or in the ordinary course bring them into relation, if the risk from the fellow servant is only

(1) [1893] P. 326.

(2) 3 Macq. 300, 307.

the same risk as from men employed by other masters in the same type of occupation, if there is no common object immediate or remote between the employments of the fellow employees, even though concerned in the same class of work except that they are all engaged in seeking to make money for the same employer, I think there is prima facie no case of common employment.

The question is whether this principle, which is true equally in the case of drivers of lorries on the highway as of captains of vessels, applies in the facts of the present case. The learned judge has held that it does, on the facts as he has found them. The Court of Appeal, departing materially from the findings of fact of the judge, have come to a different conclusion. I prefer the findings of the judge and his conclusion. I may recapitulate the material facts, which are simple. The respondents, who, as appears from the documents, had their head office in Preston, a garage in Bootle, and a depot in Islington in Liverpool, had motor coaches which they let out to hire. The deceased man was one of the drivers. On the occasion in question the deceased man had his independent instructions, and though he proceeded in company with four other coaches, which started from the same garage, went to the same place to pick up the passengers, took them to the same destination and was directed to return to the Bootle garage, his instructions were addressed to him individually. He was not in any true sense engaged on a joint operation with the others. In particular, it was left entirely to his own discretion by what route he should return. Actually he was returning independently and separately from the other four coaches when he happened to stop on the Liverpool side of the Mersey Tunnel for some reason; what it was does not appear. There is no evidence that he had a breakdown. The other driver whose negligence caused the death was delayed in the tunnel and was coming up independently when he saw the deceased man's coach standing in the street. He said that he proceeded to pass alongside him to see why the deceased man had stopped. There is no evidence of any compulsion or order of the employer which brought these two men together at that time and place. The concurrence of their courses was fortuitous. The decision of the Court of Appeal is based on a finding that the two men were engaged in common work, because in the view of the Court "they were engaged in "carrying out together the order of their employer to get back "direct to the garage and because Jones [the other driver] was "in fact doing what he was expected to do by his employer, "that is to say, trying to get in front of the deceased's coach "and then pull up and go to his assistance." I cannot agree, with all respect, that these findings, which are not in accordance with the findings of the judge, are justified. As to the former the men were not in my opinion engaged in carrying out any order "together." Each was independently carrying out the separate order given to him. Nor is there any evidence that his employers expected that he would act as the Court of Appeal have held that he did, even if that Court's view of the circumstances were justified. The learned judge found that there was not any breakdown of the coach, or any occasion for Jones to go to the deceased man. And as to duty to go, the judge found that the highwater mark of the evidence, given by a witness who, in the judge's view, knew nothing about it, was, "Oh, it might happen if one Ribble bus sees another stopped he "might go and ask what is the matter." I accept these findings.

In my opinion the circumstances here, as found by the judge, are such that, having regard to the nature of the employment, there was no common work justifying the conclusion that the deceased man's contract of employment was subject to the fictitious implied term that he assumed the risk of his fellow-servant's negligence while driving his employer's coach on the highway on a separate job. I think there was no such term, any more than there was in *The Petrel.* (1) The two drivers concerned, when they were on the road severally driving their motor coaches, were engaged on independent pieces of work. There was no common work. The deceased man was not exposed to the risk of the negligence of another employee of the respondents driving another of the company's coaches, in any greater degree, or in any different sense, than he was exposed to the risk of any other driver's

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(1) [1893] P. 320.

Lord Wright.

negligence on the road. The risk was the general risk of the highway, not the specific risk of the fellow servant's negligence. This can be tested by supposing that the accident had occurred on the open road when one driver was returning to the Bootle garage and the other proceeding to the company's head office in Preston, and the two coaches had collided owing to the negligence of the driver of one. This, I think, for reasons sufficiently explained, would not be a case of common employment. I see no difference in principle between the present case and such a case or the others I have suggested as instances. The deceased man may be imagined, if the implied term were stated to him when he entered the employment, as observing : "Well, I shall "generally be driving the coach I am assigned to on my own job "and not be concerned with any risk from my fellow "employees driving their coaches on their jobs." It may be that the men while working in the respondents' garage are in common employment for the time in which they are occupied in working together there, in the same way as in the opinion of Jeune P. the crews of ships owned by the same owners might be in common employment while the ships were in the same dock, and perhaps the same might be true also in other circumstances which might occur in their employment. I am limiting my conclusion to the special facts of this case, as found by the judge. Other cases may raise different problems and lead to different conclusions.

It is enough here to say that I think it would on the facts so found be contrary to the principles explicitly laid down by this House to hold that the respondents' employees while thus severally driving the coaches on independent journeys on the roads, which was a substantive part of their regular employment, were engaged in a common work or were within the rule of common employment. I accordingly agree with the decision of the judge and think the appeal should be allowed.

Turner-Samuels for the appellant. My Lords, may I mention the point of the 500*l.* damages in respect of loss of expectation of life which were assessed by Hawke J. in the Court below but not given to the appellant because at that time the case of

Rose v. *Ford* (1) was under consideration in your Lordship's House. That figure was fixed in order to avoid any further litigation; the figures were agreed.

LORD ATKIN: I thought the figures were now all agreed and that, if the appeal were allowed, that 500*l.* would go to the appellant.

Turner-Samuels: If your Lordship pleases.

LORD ATKIN: Do you assent to that, Mr. White?

Eric White for the respondents: That is so, my Lord; I do not dispute that.

LORD ATKIN: That will be dealt with in the order. The judgment had better be expressed to include that amount.

Appeal allowed.

Solicitors for appellant: *Silverman, Jordan & Co., for Silverman & Livermore, Liverpool.*

Solicitors for respondents: *Berrymans, for Weightman, Pedder & Co., Liverpool.*

(1) [1937] A. C. 826.

Applied. Dollfus Mieg, etc. *v.* Bank of England. [1949] 1 All E.R. 946.

[HOUSE OF LORDS.]

H. L. (E.)*
1939
Jan. 24, 26, 27, 30; *Feb.* 2, 23.

GOVERNMENT OF THE REPUBLIC OF SPAIN . . . . APPELLANTS;

AND

S.S. "ARANTZAZU MENDI" . . . . RESPONDENTS.

THE ARANTZAZU MENDI.

International law—Comity of nations—Immunity of ship from arrest—Foreign sovereign State—Requisition—Possession—Vessel already under arrest—De facto and de jure governments—Arrest by Republican Government of Spain of vessel requisitioned by Nationalist Government.

In 1937 a Spanish ship registered at Bilbao was requisitioned by the Government of the Republic of Spain. She was not then in Spanish territorial waters. On her arrival in the Thames her owners issued a writ in rem for possession; she was arrested by the Admiralty Marshal, and at all material times she remained under arrest. On April 5, 1938, she was requisitioned by the Nationalist Government, and the master and managing director of the owners agreed to hold her at the disposal of the Nationalist Government. Thereupon the Republican Government issued a writ purporting to make the vessel a defendant, and ordering her to enter an appearance, and served a warrant of arrest on her. The Nationalist Government entered an appearance under protest and moved to set aside the writ and arrest on the ground that the action impleaded a foreign sovereign State—namely, the Nationalist Government of Spain. On the question as to the status of that Government Bucknill J. directed a letter to be written to the Foreign Office asking whether the Nationalist Government was recognized by His Majesty's Government as a foreign sovereign State, and in answer thereto the Foreign Secretary replied that "His Majesty's Government recognizes "the Nationalist Government as a Government which at present "exercises de facto administrative control over the larger portion "of Spain. His Majesty's Government recognizes that the "Nationalist Government now exercises effective administrative "control over all the Basque Provinces of Spain. . . . The "Nationalist Government is not a Government subordinate to "any other Government in Spain":—

Held, (1.) that the writ in purporting to make the vessel a defendant and ordering her to enter an appearance was wholly

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

H. L. (E.)

1939

THE ARANTZAZU MENDI.

irregular; (2.) that the answers of the Foreign Office as to the status of the Nationalist Government were conclusive that that Government was a foreign sovereign State for the purposes of international law; (3.) that the vessel was in the possession of the Nationalist Government at the material date by the master and crew acting with the consent of the owners; (4.) that the respondents were impleaded by the action, and, as they were the Government of a sovereign State, the writ and warrant of arrest must be set aside.

A ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshal. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the Court which ordered the arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all the remedies based on possession.

Decision of Court of Appeal [1939] P. 37 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming an order of Bucknill J. (2) setting aside, at the instance of the Nationalist Government of Spain, a writ in rem issued by the Republican Government of Spain under which they claimed to have possession of the steamship *Arantzazu Mendi* adjudged to them.

That vessel was a Spanish ship registered at Bilbao. After that port was captured by General Franco's forces she was requisitioned by the Republican Government. She was then on the high seas, and on August 11, 1937, on her arrival in London, her owners issued a writ in rem for possession, and in pursuance thereof the ship was arrested by the Admiralty Marshal in the Surrey Commercial Docks. To that writ the Republican Government entered a conditional appearance. On March 28, 1938, General Franco issued a decree requisitioning the ship in question and other vessels for public services. On April 11, 1938, the owners' possession action was discontinued, but the vessel still remained under arrest. On April 13 the managing director of the owners made a notarial declaration that he consented to the order of requisition and held the vessel at the disposal of the Nationalist Government. The master made a similar declaration. On the same day the Republican Government issued the present

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(1) [1939] P. 37. (2) [1938] P. 233.

H. L. (E.)
1938
THE ARANTZAZU MENDI.

writ, which the Nationalist Government sought to set aside on the ground that it impleaded a foreign sovereign State which was unwilling to submit to the jurisdiction of the Court.

An issue being raised whether the Nationalist Government was a foreign sovereign State, Bucknill J. directed a letter to be sent to the Foreign Office to ascertain whether His Majesty's Government recognized the Nationalist Government. The material parts of the reply were as follows: "His "Majesty's Government recognizes the Nationalist Govern-"ment as a Government which at present exercises de facto "administrative control over the larger portion of Spain. "His Majesty's Government recognizes that the Nationalist "Government now exercises effective administrative control "over all the Basque Provinces of Spain. His Majesty's "Government have not accorded any other recognition to the "Nationalist Government. The Nationalist Government is "not a Government subordinate to any other Government in "Spain. The question whether the Nationalist Government "is to be regarded as that of a foreign sovereign State appears "to be a question of law to be answered in the light of the "preceding statements and having regard to the particular issue "or circumstances with respect to which the question is raised."

On this Bucknill J. held that the Nationalist Government was, for the purposes of the present case, a foreign sovereign State, that it had done all that it could legally do to obtain possession of the ship consistently with the fact that she was already under arrest, and that the Nationalist Government was impleaded by the action as a party interested in the res. He accordingly set aside the writ and the warrant of arrest.

The Court of Appeal affirmed the decision of Bucknill J., holding that, having regard to the authorities, the answers of the Foreign Office required the Court to say that His Majesty's Government regarded the Nationalist Government of Spain as the Government of a foreign sovereign State. Further, even assuming that it was right to say that the Nationalist Government could not show that they were in possession of the ship, and that the legal possession was in the

Admiralty Marshal, they had shown a sufficient interest in the ship for them to be compelled to come before the Court to defend that interest. They were therefore impleaded in the action, and, being a Government of a foreign sovereign State, were entitled to rely on the general rule.

The Republican Government of Spain appealed to this House.

G. St. C. Pilcher K.C., *Owen Bateson* and *J. G. Foster* for the appellants. Two questions arise, first, is that portion of Spain which is under the de facto administrative control of the Nationalist Government a foreign sovereign State entitled to claim immunity from the jurisdiction of our Courts; and secondly, if the answer to that first question is in the affirmative, is the Nationalist Government impleaded by the present proceedings? With regard to the first question, we submit that the Nationalist Government is not a foreign sovereign State. The status of a foreign sovereign State is a matter of public notoriety, and, if there is any doubt on the point, that doubt can be resolved only by inquiries made at His Majesty's Foreign Office. That office on being applied to on the subject gave an answer which does not establish the respondents' status as a foreign sovereign State. *Luther* v. *Sagor* (1) is distinguishable. There it appeared that our Foreign Office recognized the Soviet Government as the de facto Government of Russia at the material date. In the present case there has been merely a recognition of insurgency; and it is contrary to the principles of international law to concede full sovereign status to a body which confessedly has not attained its full aim. Sovereignty pertains to a State, not to a Government, and the letter from the Foreign Office should be interpreted bearing that in mind. A recognition of insurgency does not carry with it all the attributes of true sovereignty, even provisionally. As is pointed out in Oppenheim's International Law, 5th ed., vol. i., p. 119, "For every State that is not "already, but wants to be, a member [ot the Family of Nations] "recognition is therefore necessary. A State is, and becomes,

(1) [1921] 3 K. B. 532.

"an International Person through recognition only and "exclusively," and again the same writer says (p. 127): "recognition of a new State must not be confused with "recognition of a new Head or Government of an old State. "Recognition of a change in the headship of a State, or in the "form of its Government, or of a change in the title of an old "State, are matters of importance. But the granting or "refusing of these recognitions has nothing to do with "recognition of the State itself." Further he says (p. 136) that " the political reasons for deciding in certain circumstances "to grant de facto recognition rather than de jure recognition "are obvious. The legal difference, however, between them "is not so clear. It is believed that in International Law the "tendency is to regard de facto recognition as revocable and "de jure recognition once given as definitive and irrevocable." The same writer also points out that there may be a recognition of insurgency (pp. 137, 138) which, we contend, exactly defines the position of the present respondents. See also Hall's International Law, 8th ed., pp. 103 et seq. It is contrary to the principles of international law to concede full sovereign status to insurgents, a body which has not yet attained its full aim. The letter to the Foreign Office invited a plain answer to a plain question, but the answer given is the reverse of plain. [They also cited *Compania Naviera Vascongado* v. *Cristina Steamship* (1); *Duff Development Co.* v. *Kelantan Government* (2); and *Banco de Bilbao* v. *Sancha.* (3)]

Secondly, even assuming we are wrong on our first contention, we contend that the Nationalist Government is not impleaded by these proceedings. That Government never had possession of the ship, both physical and legal possession of the ship being in the Admiralty Marshal: *The Petrel.* (4) As is pointed out in Roscoe's Admiralty Practice 5th ed., p. 276: " From the moment the warrant is served, the "Marshal is liable for the safe custody of the ship or cargo "arrested: *The Hoop* (5); and the res cannot be moved from

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(1) [1938] A. C. 485.
(2) [1924] A. C. 797.
(3) [1938] 2 K. B. 176.
(4) (1836) 3 Hagg. Adm. 299.
(5) (1801) 4 C. Rob. 145.

H. L. (E.)

1939

THE ARANTZAZU MENDI.

"the place where it is arrested, or cargo under arrest "be unloaded without an order of the Court : see *The* "*Rendsberg.* (1) If any person interferes with the res whilst "under arrest he is guilty of contempt of Court." In *Charlesworth* v. *Mills* (2) Lord Halsbury L.C. pointed out that the possession of the sheriff " was just as much a physical and "actual possession as it is possible for any one man to have "in articles which are distributed all over a house." While the sheriff retains possession of goods, his position is the same as that of the Marshal.

Sir Robert Aske K.C., J. V. Naisby and *R. Valls* for the respondents. The position of a ship which is under arrest is that she is in custodia legis ; possession is not in the Marshal, who cannot bring trover or trespass. In *The Hoop* (3) the Marshal was held liable for a loss sustained by pillage while the property was in his custody.

On the main question as to the position of the respondents in international law, a de facto Government having the occupied territory completely under its control has necessarily full responsibility, and its acts have the status of acts of a Government which will be recognized: *Bank of Ethiopia* v. *National Bank of Egypt* (4) ; see also to the same effect *Republic of Peru* v. *Peruvian Guano Co.* (5)

[LORD ATKIN. The question is whether our Government has recognized the Nationalist Government as a foreign sovereign State.]

There is a territory in which that Government is sovereign ; it is not necessary for us to define its limits. In *Duff Development Co.* v. *Kelantan Government* (6) Viscount Cave cited with approval Vattel's definition of a sovereign State as " a nation "which governs itself by its own authority and laws without "dependence on any foreign power." See also the definition of " State " in Dicey's Conflict of Laws, 5th ed., pp. 50, 54 ; Oppenheim's International Law, 5th ed., vol. i., p. 112 ; Wheaton's International Law, 6th ed., vol. i., p. 38 ;

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(1) (1805) 6 C. Rob. 144.
(2) [1892] A. C. 231, 238.
(3) 4 C. Rob. 145.
(4) [1937] 1 Ch. 513.
(5) (1887) 36 Ch. D. 489, 497.
(6) [1924] A. C. 797, 807.

Westlake's International Law, Part I., Peace, p. 20. See further the United States decisions: *Wulfsohn* v. *Russian Socialist Federated Soviet Republic* (1); *Nankivel* v. *Omsk All-Russian Government*. (2)

As to possession: this case comes within the rule laid down in *The Cristina*. (3) The master attorned to the Nationalist Government by undertaking to hold the vessel at their disposal. But for the arrest by the appellants, the respondents would have obtained possession of the vessel.

Pilcher K.C. in reply. The question is whether upon the answer by the Foreign Office to the letter addressed to it there can be extracted a finding that His Majesty's Government has recognized the respondents as a foreign sovereign State. We submit that the area described in the answer is not a State. The Foreign Office regards Spain as one State. If the answer is ambiguous, it should be referred back, or the House should say that recognition has not been established.

Feb. 2. LORD ATKIN. The appeal will be dismissed. The reasons will be stated on a later date.

Feb. 23. LORD ATKIN. My Lords, this was an appeal from an order of the Court of Appeal dismissing an appeal from an order of Bucknill J. in the Admiralty Division by which he ordered that the writ and all further proceedings in this action and the arrest of the steamship *Arantzazu Mendi* be set aside. The writ, issued on April 13, 1938, was expressed to be between the Government of the Republic of Spain, plaintiff, and the steamship or vessel *Arantzazu Mendi* and Eugenio Renteria, the late master of the said steamship, defendants, and commanded the defendants to cause an appearance to be entered for them in the Admiralty Division. The plaintiffs' claim was to have possession of the said steamship adjudged to them.

The writ appears to me to have been wholly irregular. It purported to make a chattel (the ship) a defendant and to

(1) (1923) 138 Northeastern Reporter, 24.
(2) (1923) 142 Northeastern Reporter, 569.
(3) [1938] A. C. 485.

H. L. (E.)
1939
THE ARANTZAZU MENDI.
Lord Atkin.

order the chattel to enter an appearance. I think that it might have been set aside, unless amended, on that ground alone, and that no warrant of arrest should have been issued on it. It makes it no better that the form was obviously adopted to seek to evade the difficulty that might have been caused if the plaintiffs had described the proposed defendants in terms that would have included the Nationalist Government of Spain, subject to whose directions the master and crew were holding the vessel. However, this point does not arise. The Nationalist Government of Spain entered a conditional appearance and then moved to set aside the writ and the arrest on the ground that the action impleaded a foreign sovereign State and that the ship was in their possession. Bucknill J. made the order applied for; he was affirmed by the Court of Appeal, and on February 2 this House dismissed the appeal from this order. We then stated that we would give our reasons for the decision at a later date, and this I proceed to do.

My Lords, in the events that have happened it does not seem necessary to discuss this case at much length. The question is whether the Nationalist Government of Spain represent a foreign sovereign State in the sense that entitles them to immunity from being impleaded in these Courts, and, if so, whether they are impleaded in the action by reason of being in possession of the ship in question. I state the question in that form as being sufficient to dispose of the present case. As, in my opinion, there is no doubt that the Nationalist Government was in fact in possession of the ship, the question does not arise that was discussed in *The Cristina* (1), whether on a writ framed in the ordinary form of a writ in rem and not having specified defendants the mere fact that a foreign sovereign State was claiming to be in possession or to be entitled to possession was sufficient to show that the State was impleaded without proof that the claim was rightly or reasonably made. On the question whether the Nationalist Government of Spain was a foreign sovereign State, Bucknill J. took the correct course of directing a letter, dated May 25,

(1) [1938] A. C. 485.

1938, to be written by the Admiralty Registrar to the Secretary of State for Foreign Affairs, asking whether the Nationalist Government of Spain is recognized by His Majesty's Government as a foreign sovereign State. I pause here to say that not only is this the correct procedure, but that it is the only procedure by which the Court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign State. This, I think, is made clear by the judgments in this House in the *Kelantan* case. (1) With great respect I do not accept the opinion implied in the speech of Lord Sumner in that case that recourse to His Majesty's Government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone.

The answer of the Foreign Secretary was given in a letter dated May 28, 1938. After stating that His Majesty's Government recognize Spain as a foreign sovereign State, and recognizes the Government of the Spanish Republic as the only de jure Government of Spain or any part of it, the letter proceeds: " 5. His Majesty's Government recognizes the "Nationalist Government as a Government which at present "exercises de facto administrative control over the larger "portion of Spain.

" 6. His Majesty's Government recognizes that the "Nationalist Government now exercises effective administrative "control over all the Basque Provinces of Spain.

" 8. The Nationalist Government is not a Government "subordinate to any other Government in Spain."

My Lords, this letter appears to me to dispose of the controversy. By " exercising de facto administrative control " or " exercising effective administrative control," I understand exercising all the functions of a sovereign government, in maintaining law and order, instituting and maintaining courts of justice, adopting or imposing laws regulating the relations of the inhabitants of the territory to one another and to the Government. It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In those circumstances it seems to me that the recognition of a Government as possessing all those attributes in a territory while not subordinate to any other Government in that territory is to recognize it as sovereign, and for the purposes of international law as a foreign sovereign State. It does not appear to be material whether the territory over which it exercises sovereign powers is from time to time increased or diminished. In the present case we appear to be dealing with a claim based upon a legislative decree affecting merchant shipping registered at Bilbao in the Basque Provinces, the territory specially designated in the sixth paragraph of the Foreign Office letter. That the decree therefore emanated from the sovereign in that territory there can be no doubt. There is ample authority for the proposition that there is no difference for the present purposes between a recognition of a State de facto as opposed to de jure. All the reasons for immunity which are the basis of the doctrine in international law as incorporated into our law exist. There is the same necessity for reciprocal rights of immunity, the same feeling of injured pride if jurisdiction is sought to be exercised, the same risk of belligerent action if Government property is seized or injured. The non-belligerent State which recognizes two Governments, one de jure and one de facto, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal Courts.

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(1) [1924] A. C. 797.

For these reasons I think that it was established by the Foreign Office letter that the Nationalist Government of Spain at the date of the writ was a foreign sovereign State and could not be impleaded.

On the question whether that Government was in possession of the ship, so that the claim of the writ was to take possession from it and transfer it to the plaintiffs, there seems to me little difficulty. Following a decree for requisition made by the Nationalist Government it is proved that on April 13, 1938, the owners agreed to the vessel being requisitioned at the free disposal of the Nationalist Government, while on April 5 the master had undertaken to retain possession at the disposal of the Nationalist Government. The vessel had in fact been arrested on April 24, 1937, in a possession action by the owners, The Compania Sota y Aznar against The Bay of Biscay Co., Ld., Don Ramo de la Sota Aburto and others, which was terminated by a consent order dated March 28, 1938. During this period the ship had been lying in the Surrey Commercial Dock with a master and crew on board, and the Marshal's representative, "the ship keeper," maintaining the arrest. After the consent order the ship keeper remained on board under a claim for the daily expenses "while the ship is in the custody of the Marshal," as expressed in the Supreme Court Fees Order, 1930, s. IV.B 93. As a result the arrest was not withdrawn at the time of the arrest in the present action. Founding on this the plaintiffs say that the ship was in the possession of the Marshal and could not therefore be in the possession of the Nationalist Government. This seems to me based upon a misapprehension of the position created by the arrest. The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshal. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the Court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession. There may be some doubt even whether the sheriff's officer, who has levied under a fieri facias, is in fact in possession. But his case is quite different, for he acts under a direction of the Court to make of the goods of the defendant so much money: he has the right to sell and therefore to hand over possession to the purchaser. His case therefore need not be discussed here. But a bare arrest appears to me clearly to give custody and not possession. The argument on this footing fails, and the simple fact emerges that the Nationalist Government was in possession of this ship at the material date by the master and crew acting with the consent of the owners. For these reasons, my Lords, the appeal was, in my opinion, rightly dismissed.

LORD THANKERTON. My Lords, I agree.

LORD RUSSELL OF KILLOWEN. My Lords, I agree. The letter addressed to the Secretary of State was one which invited an answer to a question of fact—namely, whether or not the Nationalist Government of Spain was recognized by His Majesty's Government as the Government of a foreign sovereign State; but the answer of May 28, 1938 (in para. 9), poses another and quite a different question—namely, whether the Nationalist Government should be so regarded. The earlier portion of the letter, however, contains statements (I refer to the paragraphs numbered (5.), (6.) and (8.)) which can lead to only one conclusion of fact—namely, that His Majesty's Government does recognize the Nationalist Government as the Government of a sovereign State which has the larger portion of Spain (including in particular the Basque Provinces) under its exclusive authority and control.

In these circumstances, and for the reasons stated by my noble and learned friend Lord Atkin, the unavoidable result was that this appeal was dismissed.

LORD MACMILLAN. My Lords, I agree with the reasons which have been stated by my noble and learned friend on the Woolsack for dismissing the appeal.

LORD WRIGHT. My Lords, I agree, and merely add a few words because of what might appear to be a difficulty in respect of the final paragraph of the letter of May 28, 1938, from His Majesty's Secretary of State for Foreign Affairs. The Court is, in my opinion, bound without any qualification by the statement of the Foreign Office, which is the organ of His Majesty's Government for this purpose in a matter of

H. L. (E.)
1939
THE ARANTZAZU MENDI.
Lord Wright.

this nature. Such a statement is a statement of fact, the contents of which are not open to be discussed by the Court on grounds of law. But I do not think that in this case the Foreign Office meant that they should be so open. The Foreign Office stated the precise facts as then existing in regard to recognition by His Majesty's Government, by the decision of which recognition is given or withheld. The question of law left to the Court was what was the effect of these facts on the issues before the Court.

For the purposes of this case the letter of the Foreign Office appears to me to have stated sufficiently, and in substance, that the Nationalist Government of Spain had been recognized by His Majesty's Government as a de facto Government, not subordinate to any other Government in Spain, and ruling over the larger portion of Spain, within which is included Bilbao, the vessel's port of registry. That statement is, in my opinion, sufficient, when taken together with the other facts of the case, to bring into operation the principles of law expounded by this House in *The Cristina* (1), with the result that the appeal was rightly dismissed.

Appeal dismissed.

Solicitors for appellants: *Petch & Co.*
Solicitors for respondents: *H. A. Crowe & Co.*

(1) [1938] A. C. 485.

[PRIVY COUNCIL.]

In re THE UNION OF THE BENEFICES OF WESTOE AND SOUTH SHIELDS, ST. HILDA.

J. C.*
1939
Jan. 17.

Ecclesiastical law—Union of benefices—Principles to be applied—Union of Benefices Measure, 1923 (14 *&* 15 *Geo.* 5, *No.* 2)*—Union of Benefices* (*Amendment*) *Measure,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *No.* 2)*—Effect of amendment.*

The amendment of s. 2, sub-s. 6, of the Union of Benefices Measure, 1923, by that of 1936 was rather one of words than of substance. It is possible that it was intended by the amendment to ensure that the interests of religion should be the first care of the Commissioners in making their report, but regard must be had to the circumstances and claims of the parishes, and the deprivations and inconveniences which they may suffer must be compensated by benefits.

In re Benefices of Great Massingham and Little Massingham [1931] A. C. 328 referred to.

Appeal allowed.

Appeal under the Union of Benefices Measures, 1923 to 1936.

The appeal was by the Parochial Council of Westoe against a scheme framed by the Ecclesiastical Commissioners under the Union of Benefices Measures, 1923 to 1936, for the union of Westoe and South Shields, St. Hilda.

The scheme of the Commissioners provided that St. Hilda's should be the parish church of the united benefices. That St. Thomas's, Westoe, should be demolished and its site sold. One of the two parsonage houses should also be sold and, with the proceeds of the sales, a new church should be erected in one of the new housing districts in the Diocese of Durham to be selected by the Lord Bishop. The organ, furniture and fittings, or such of them as should be selected, were to be removed to the new church and the endowments of St. Thomas's were to be the endowments of the new church.

The facts are more fully stated in the judgment of their Lordships.

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* *Present :* The Lord Chancellor (Lord Maugham), Lord Macmillan, and Lord Romer.

Reported by C. Sidney Smith, Esq., Barrister-at-Law.

1938. Dec. 15. *Geoffrey Hutchinson* for the appellant. The position of the two parishes is this: they are both parishes in which there is an active and efficient parish life, and in which the endowments are sufficient for the purposes of the incumbents. The scheme has really proceeded for an entirely different reason from that which is usually put forward to justify such schemes. The Commissioners were influenced by the desirability of providing funds for a new parish which it was proposed to establish in another part of South Shields. It was never suggested that either of the two parishes which it is proposed to unite would benefit by the union, and to justify a union the scheme must, among other things, be in the interests of the parishes concerned: *In re Benefices of Great Massingham and Little Massingham.* (1)

Humphrey H. King for the Ecclesiastical Commissioners. The main grounds on which the scheme is supported are that it is for the benefit of religion as a whole, in that there will be a very great advantage to a district very much unchurched at present; there will be a saving of man power, and scarcely any hardship to anybody affected. It is to be observed that in the new Measure—the Union of Benefices (Amendment) Measure, 1936, under which this matter falls to be dealt with, the fact that regard must be had to the interests of religion generally is placed before consideration of the interests of the parishes concerned, whereas in s. 6 of the Union of Benefices Measure, 1923, which was operative when *In re Benefices of Great Massingham and Little Massingham* (1) was decided, the "interests of the parishes affected" were placed in the section before those of "religion in England generally," which would appear to indicate that the present intention is that the interests of religion generally should be regarded as of primary importance.

1939. Jan. 17. The judgment of their Lordships was delivered by LORD ROMER. This is an appeal to His Majesty in Council against a scheme framed by the Ecclesiastical Commissioners under the Union of Benefices Measures, 1923

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(1) [1931] A. C. 328.

J. C.
1939

THE UNION OF THE BENEFICES OF WESTOE AND SOUTH SHIELDS, ST. HILDA, *In re.*

to 1936, for the union of the benefices of Westoe and South Shields, St. Hilda, in the County and Diocese of Durham, the appellants being the Parochial Church Council of Westoe.

The parishes in question are situate in South Shields. They are both industrial in character and are inhabited almost exclusively by persons of the wage-earning class.

The parish of Westoe has at the present time a population of approximately 5000 persons and covers an area of 53 acres. The church of St. Thomas, the parish church, which has sittings for 570 persons, was built in the year 1875, largely through the generosity of a local Churchman who contributed 2600*l.* to the building fund and presented the organ. It appears that before that time a chapel of ease had existed upon the site now occupied by the church. The parish has also its own parsonage house, which was built about the year 1898, and which contains some fourteen rooms. It is rated at 72*l.* per annum. The annual income of the benefice is 366*l.* 6*s.* 2*d.* in addition to fees and Easter offerings, which amount to about 25*l.* per annum. In the past the Ecclesiastical Commissioners have made a curate's grant of 120*l.* per annum, but that has not been fully claimed since the year 1933. An active and enthusiastic parish life exists in the parish. Eloquent testimony of this is to be found in the fact that, poor as the parishioners are, no less a sum than 850*l.* has been raised by them during the past ten years and spent on beautifying and improving their parish church.

The adjoining parish of South Shields, St. Hilda, is larger in area than that of Westoe, covering as it does approximately 130 acres. Its population, however, is rather smaller and consists of some 4700 persons. It contains a church with sittings for 1500 and a parsonage house rated at 62*l.* per annum. The parish also contains a mission room which is used for services. The annual income of the benefice is 613*l.* 12*s.* 4*d.*, consisting of rents of just over 180*l.*, and of 433*l.* received from the Ecclesiastical Commissioners. There are in addition fees amounting to 42*l.* per annum and the Commissioners make two grants of 120*l.* per annum each for the stipends of an assistant curate and a woman worker.

In both parishes there is an ample provision of church services, and the average attendance at such services compares not unfavourably with that at other places of worship in urban and industrial districts.

In pursuance of the provisions of s. 2 of the Union of Benefices Measure, 1923, the Lord Bishop of Durham caused a commission to be issued requiring five Commissioners nominated as provided by the Measure to inquire into and report upon the union of the two benefices.

The Commissioners held a public inquiry on February 27, 1937. No one among the 120 or 130 persons appearing before the Commissioners on that occasion was in favour of the union, and it was apparent from the proceedings that the Parochial Church Council of Westoe and a large number of the Westoe parishioners were strongly opposed to it. And this is not surprising. For the proposal for the union which had originated with the Diocesan Committee was not due to any desire to improve the existing state of affairs in the two parishes but to a desire to remove the church and endowments of St. Thomas, Westoe, to one of the new housing districts that were springing up in the neighbourhood of South Shields and for which such a provision was sorely needed. It was, indeed, admitted by the learned counsel for the Ecclesiastical Commissioners that no benefit of any kind would accrue to the two parishes themselves from the proposed union. The Commissioners, however, made a recommendation in favour of the union of the two benefices and parishes, the decision to do so being carried by three votes to two. The two dissentients were the Commissioners nominated by the patrons and Parochial Church Council of Westoe and South Shields, St. Hilda, respectively. The other recommendations, upon which the Commissioners were unanimous (if the scheme were to be carried out), were so far as material as follows: (*a*) that St. Hilda's should be the parish church of the united benefice; (*b*) that the church of St. Thomas should be removed to one of the new housing districts; (*c*) that the incumbent of the united benefice should select which of the parsonage houses he prefers; (*d*) that

(1.) the other parsonage house ;
(2.) the site of the church of St. Thomas ;
(3.) the mission hall ;
be sold and the proceeds utilized for the removal of St. Thomas Church and its re-erection in one of the new housing districts, and for the provision of a parsonage house and new hall in such district, and that, if there were any surplus, it should be devoted to the benefice of the incumbent of the transferred church ; and (*e*) that the endowments of St. Thomas should be the endowments of the benefice of the transferred church.

The Lord Bishop of Durham in due course signified his approval of the report, and thereupon the Ecclesiastical Commissioners prepared a draft scheme for the purpose of giving effect to the recommendations therein contained, it being provided by the draft scheme that the new district to which the church of St. Thomas, Westoe, and its endowments were to be transferred should be a district in the Diocese of Durham to be selected by the Lord Bishop. The draft scheme further provided that the bells, organ and other furniture and fittings of the church of St. Thomas, Westoe, or such of them as the Lord Bishop should select should be removed to the parish church of the united benefice, and that any such articles not so removed should be appropriated for use in the proposed church of the new district or be removed to any other church or chapel within the diocese as therein mentioned. The draft scheme, however, differed from the report in that the mission hall of South Shields, St. Hilda, was allowed to remain. The draft scheme after its publication continued to meet with the most strenuous opposition on the part of the Parochial Church Council of Westoe. Their objections, however, met with no success, and on December 16, 1937, the Ecclesiastical Commissioners certified the scheme under s. 10, sub-s. 2, of the Union of Benefices Measure, 1923. The Parish Council, accordingly, now present this petition of appeal to His Majesty in Council asking that the scheme may be disallowed.

In support of their appeal the appellants call in aid the

J. C.
1939
THE UNION OF THE BENEFICES OF WESTOE AND SOUTH SHIELDS, ST. HILDA, *In re.*

decision of this Board in the case of *In re Benefices of Great Massingham and Little Massingham.* (1) In delivering the judgment of the Board in that case Lord Tomlin summed up the facts as follows: " Each of the parishes concerned is a "complete unit, fully equipped with all that is necessary for "parochial church life, including adequate emoluments for the "incumbent, nor has there been in either parish any change of "circumstances calling for a readjustment of conditions. It "is admitted that the union must result in a measure of loss "to the parishioners, and no advantage from union can be "indicated as likely to accrue to them."

Every word of this is true of the two parishes the subject of the scheme now under consideration. In the earlier case, moreover, as in the present one, the object of the scheme was to take away a part of the joint endowments of the two benefices and apply it in endowing some other benefice. In these circumstances the Board reported to His Majesty in Council recommending that the scheme should be dismissed. It was held, to use the words of Lord Tomlin, " that to justify "a union of two benefices it is not enough to show that one "incumbent could serve the parishes affected, and that a "union would therefore save man power and might also "produce surplus income available for other benefices. The "circumstances and interests of the parishes themselves must "be regarded."

At the time that this decision was given the principles to be observed by the Commissioners appointed to inquire and report upon a proposed union of benefices were enunciated in s. 2, sub-s. 6, of the Union of Benefices Measure, 1923. The sub-section was in these terms: " (6.) The Commissioners "shall in making any report under this Measure have full "regard to the circumstances and interests of the parishes "affected by their inquiry, and it shall be the duty of each "and every of the Commissioners to consider the matters "under inquiry in their relation to such circumstances and "interests and to the interests of religion in England generally."

This sub-section was repealed by the Union of Benefices

(1) [1931] A. C. 328, 332.

(Amendment) Measure, 1936, and has been replaced by s. 2, sub-s. 1, of that Measure, which is as follows: "2.—(1.) The "Commissioners to whom a commission under the principal "Measure has issued shall have due regard to the interests "of religion generally as well as to the circumstances and "claims of the parishes affected by their inquiry and shall "determine in their discretion the effect of all these con-"siderations and shall report accordingly."

The alteration in the law thus effected would seem to be rather one of words than one of substance. The word "interests" in the repealed sub-section is replaced by the word "claims" in the new one, but it is by no means apparent why this change was made or what effect, if any, it was intended to produce. The other change to be noticed is that of the things to be considered by the Commissioners the interests of religion generally are mentioned first in the new sub-section whereas in the old sub-section they were to be found at the end. It is possible that it was intended by this change to ensure that the interests of religion generally should be the first care of the Commissioners in making their report. But it is plain that those interests are not the only thing to be regarded. In the words of the sub-section regard is to be paid to those interests "as well as to the circumstances "and claims of the parishes." In the present case their Lordships find themselves unable to avoid the conclusion that sufficient regard has not been paid to those circumstances and claims. The joint income of the two benefices at the present time is 980*l.* or thereabouts exclusive of fees and grants made by the Ecclesiastical Commissioners for curates' stipends. The income of the united benefice would be no more than 613*l.* 12*s.* 4*d.* The parishioners of Westoe, St. Thomas, would lose their parish church, upon which, as already stated, they have spent some 850*l.* in the course of the last ten years. There is, moreover, in the present church a west window placed there as a memorial by the families of those in the parish who lost their lives in the Great War. The scheme, it is true, provides for the re-erection of the church in a new district and steps would no doubt be taken to have

J. C.
1939
The Union of the Benefices of Westoe and South Shields St. Hilda, *In re.*

the window placed in the church when so re-erected. But this would be but a poor consolation to the parishioners who happen to have feelings of attachment to their church and to the relatives of those in whose memory the window was erected ; especially in view of the fact that the new district in which the church is to be re-erected is not even specified in the scheme and may in the end prove to be a mile or more distant from the parish. There is yet another circumstance connected with the two parishes which deserves the most careful consideration. The traditions of the parish of South Shields, St. Hilda, appear to be High Church, whereas the traditions of the parish of Westoe are Low Church, and there is grave reason to fear that many of the parishioners of Westoe would dislike the character of the services at St. Hilda's and would not care to attend them. It is said by the Ecclesiastical Commissioners in their answer to this complaint that services similar in character to those held in Westoe parish church are held in two neighbouring churches. But these churches appear to be situate at some distance from the church of St. Thomas, Westoe, and, though they can be reached by omnibus, the parishioners of Westoe, who, as already stated, are of the working class, must necessarily include some to whom even an omnibus fare is a matter of moment.

Their Lordships realize to the full that every union of two benefices must result in some deprivations and some inconveniences to many, or it may be to all of the residents in the two parishes. But these residents must be prepared to make some sacrifices in order to obtain the benefits accruing to them from the union. In the present case, unfortunately, though the sacrifices demanded are many, of benefits there are none.

The result is that their Lordships must humbly propose to His Majesty in Council that the scheme be dismissed.

Solicitors for the appellant : *Evill & Coleman.*
Solicitors for the respondent : *Jennings White & Foster.*

[PRIVY COUNCIL.]

J. C.*
1939
Jan. 30.

VITA FOOD PRODUCTS, INCORPORATED Appellant;

AND

UNUS SHIPPING COMPANY, LIMITED (in Liquidation) . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC.

Contract—Conflict of laws—Bill of lading—Shipment in Newfoundland —Contract not in conformity with direction of Newfoundland law—Clause in contract that it shall be governed by English law—Action in Nova Scotia—Proper law of contract—Newfoundland Carriage of Goods by Sea Act, 1932, *s.* 3.

The Newfoundland Carriage of Goods by Sea Act, 1932, incorporated the Hague Rules, subject to certain modifications, and gave them the force of law. Sect. 3 of the Act enacted that every bill of lading " shall contain an express statement that it is to " have effect subject to the provisions of the said rules as expressed " in this Act." By these rules any clause or agreement relieving the carrier from the liability for negligence imposed by the rules is void.

Goods were shipped in Newfoundland under bills of lading which did not contain the statement required by s. 3, but which provided for exemption from liability for damage due to the negligence of the shipowners' servants, and contained a clause that the contracts " shall be governed by English law."

An action was brought in Nova Scotia against the shipowner in respect of damage to the goods.

The shipowner pleaded exceptions under the contract:—

Held, that the provisions of s. 3 of the Act were directory and not mandatory and that failure to obey the directions did not, therefore, make the contract illegal.

The proper law of the contract was the law intended by the parties—namely, English law. Applying that law, the shipowner was within the exceptions which exempted him from liability.

Dobell v. *Steamship Rossmore Co.* [1895] 2 Q. B. 408; *Rex* v. *International Bondholders* [1937] A. C. 500, 520; *Ralli Bros.* v. *Compania Naviera Sota y Aznar* [1920] 2 K. B. 287; *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (1884) 12 Q. B. D. 589; *Liverpool*

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* *Present:* Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright, and Lord Porter.

Reported by C. Sidney Smith, Esq., Barrister-at-Law.

and Great Western Steam Co. v. *Phenix Insurance Co.* (1889) 129 U. S. 397; *In re Missouri Steamship Co.* (1888) 42 Ch. D. 321; *Liverpool Borough Bank* v. *Turner* (1860) 2 De G. F. & J. 502; *Kearney* v. *Whitehaven Colliery Co.* [1893] 1 Q. B. 700; *Harland & Wolff* v. *Burns* 1931 S. C. 722; *Trinidad Shipping Co.* v. *G. R. Alston & Co.* [1920] A. C. 888; *The Industrie* [1894] P. 58; and *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co., Ld.* [1924] A. C. 522, 564 referred to. *The Torni* [1932] P. 78 dissented from.

Judgment of the Supreme Court En Banc affirmed, but for different reasons.

APPEAL (No. 82 of 1938) from a decree of the Supreme Court En Banc (March 2, 1938) which affirmed a decree of the Chief Justice (July 5, 1937).

The action was against the respondents, the owners of the *Hurry On*, for damages in respect of a consignment of herrings.

The herrings were shipped in the *Hurry On* on January 15, 1935, at Middle Arm, Newfoundland, for carriage to New York. On the voyage the *Hurry On* ran ashore in Nova Scotia, admittedly through the negligence of the captain in navigation. The herrings were unloaded, reconditioned and forwarded from a port in Nova Scotia in another ship to New York, where they were received by the appellants, who were the consignees of the herrings, in a damaged condition.

The *Hurry On* was registered in Nova Scotia and the appellants brought their action for damages in Nova Scotia.

The bills of lading under which the consignment was made were not in conformity with the provisions of the Newfoundland Carriage of Goods by Sea Act, 1932, which incorporated the Hague Rules, but were in an old form which was used by the shipper in ports outside Newfoundland. The Hague Rules provide that any clause or agreement relieving the carrier from the liability for negligence imposed by the rules is void. The bills provided (inter alia) for exemption from liability for damage due to the negligence of the shipowners' servants at or after the commencement of the voyage, and one of the terms was: "This contract shall be governed by English law." There was a further provision that, in the case of shipment from the United States, the Harter Act, 1893, should apply and that, save as so provided, the bill of lading was subject to the terms of the Canadian Water Carriage of Goods Act, 1910.

The Canadian Act applied only to shipments from any port of Canada.

It was contended by the appellants before the Chief Justice of Nova Scotia and before the Supreme Court that, as the Act of 1932 had not been complied with, the exceptions did not avail the respondents and they were subject to the liabilities of common carriers. This contention was rejected by both Courts, and the Supreme Court also held that, if the bills of lading were illegal, the parties were in pari delicto and the action must fail.

1938. Nov. 24, 25, 28, 29. *G. McL. Daley K.C.* and *W. L. McNair* for the appellant. The shipowner having failed to comply with the provisions of s. 3 of the Newfoundland Carriage of Goods by Sea Act, 1932, the question arises as to whether he can rely on the exceptions in the bill of lading, and/or the Act. The proper law of the contract is that which the parties intended to apply, and their intention may be gathered from many factors. If the provisions of s. 3 are imperative, as I submit they are, and not merely directory, failure to comply with them renders the bill of lading void. Under the Newfoundland Interpretation Act the word "shall" is to be given, prima facie, an imperative meaning. The real test is the purpose of the Act: *Liverpool Borough Bank* v. *Turner.* (1)

Before the Hague Convention, several Acts were passed in different countries, as in Canada and Australia, the purpose of which was to protect the cargo-owner from oppressive clauses in bills of lading and to provide uniformity in bills of lading: *Paterson Steamships, Ld.* v. *Canadian Co-operative Wheat Producers, Ld.* (2), and Scrutton on Charterparties, 13th ed., p. 498. Effect could be given to the intention of these Acts only by compelling parties to incorporate in their contracts the law of the port of shipment: *Dobell & Co.* v. *Steamship Rossmore Co.* (3); *In re Missouri Steamship Co.* (4); and

(1) (1860) 2 De G. F. & J. 502, 507.
(2) [1934] A. C. 538, 544, 546.
(3) [1895] 2 Q. B. 408, 413.
(4) (1888) 42 Ch. D. 321, 336.

Scrutton, p. 534. A bill of lading which is illegal at the port of shipping will not be enforced anywhere : *The Torni.* (1)

Here, if s. 3 were omitted, the parties would have absolute freedom of contract, and the whole Act would go by the board. Scrutton, p. 541, and *Harland & Wolff* v. *Burns* (2) were referred to.

If the bill of lading is null and void, the common law liability would still remain and, if the purpose of the Act here is primarily the protection of the cargo-owner, he can come and ask for his rights. He is not affected in the same way as the shipowner, and the cases on illegality would have no application to him : Anson on Contract, 18th ed., p. 251 ; *Bonnard* v. *Dott* (3) ; *Victorian Daylesford Syndicate, Ld.* v. *Dott* (4) ; and *Lodge* v. *National Union Investment Co., Ld.* (5)

Whether the shipowner here is a common carrier does not depend on the contract but on the way he offered his ship. If a common carrier, he would be liable : *London & North Western Ry. Co.* v. *Richard Hudson & Sons, Ld.* (6) [Counsel for the respondent stated that he did not dispute this.] As to the effect of bailment, reference was made to Halsbury's Laws of England, 2nd ed., vol. iv., p. 13.

The delivery of the goods was a good bailment, and that could not be destroyed by a subsequent illegal contract. It is admitted now that the master was negligent in navigating the ship. The damage was caused by that negligence, and the shipowner is liable : Winfield, Province of the Law of Tort (1931), p. 100.

We are not parties to the illegality in the contract, and we are not relying on the contract.

It is the respondent who is seeking to enforce the contract. [Reference was made to *Donoghue* v. *Stevenson* (7) ; *Feret* v. *Hill* (8) ; and *Alexander* v. *Rayson.* (9)]

W. L. McNair followed. The issue of the bill of lading without the paramount clause was prohibited by the positive law of Newfoundland, being prohibited, the contract is void at the port of shipment, the contract will not be enforced in any country. The contract is to be construed and enforced according to the lex loci contractus : *In re Missouri Steamship Co.* (1) and Dicey's Conflict of Laws, 5th ed., pp. 160, 647 and 655. Where the purpose of the transaction is lawful, but illegality occurs in the performance of the contract, the party guilty of the illegality, here the shipowner, cannot rely on the contract : *Hain Steamship Co.* v. *Tate & Lyle, Ld.* (2) ; *Angliss & Co., Australia (Proprietors), Ld.* v. *Peninsular & Oriental Steamship Co.* (3) ; *The Torni* (4) ; *Sewell* v. *Burdick.*(5)

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(1) [1932] P. 78.
(2) 1931 S. C. 722.
(3) [1906] 1 Ch. 740, 746.
(4) [1905] 2 Ch. 624, 629.
(5) [1907] 1 Ch. 300, 306.
(6) [1920] A. C. 324.
(7) [1932] A. C. 562, 610.
(8) (1854) 15 C. B. 207.
(9) [1936] 1 K. B. 169, 183.

In *Mahmoud* v. *Ispahani* (6) the whole transaction was prohibited, and the Court would not enforce the contract. In *Anderson, Ld.* v. *Daniel* (7) the transaction was legal, but there was illegality in the performance. [*Alexander* v. *Rayson* (8) was also referred to.]

In comparable legislation it is noticeable that, where a penalty is imposed on failure to comply with statutory requirements, the penalty is imposed on the ship and not on the person who receives the bills of lading : Scrutton, p. 480, and the Stamp Act, 1891.

If both parties were parties to the illegality, then neither can rely on the contract, but, if the transaction is a lawful one, both are relegated to their relationship in common law. The shipowner is liable either as a common carrier or a bailee. If the damage to the goods is due to the negligence of the shipowner, the cargo-owner can recover in tort. He is not required to pray in aid the contract which is illegal and ineffective : *Simpson* v. *Bloss* (*or Bliss*) (9) ; *Foster* v. *Driscoll* (10) ; *Hyams* v. *Stuart King* (11) ; Story on Bailments, 9th ed., s. 379, Note 4, and Scrutton, 13th ed., p. 292, art. 93, and *Elder Dempster & Co.* v. *Paterson, Zochonis & Co.* (12)

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(1) (1888) 42 Ch. D. 321, 336.
(2) (1936) 41 Com. Cas. 350.
(3) [1927] 2 K. B. 456, 459.
(4) [1932] P. 78.
(5) (1884) 10 App. Cas. 74, 105.
(6) [1921] 2 K. B. 716, 726, 728, 730.
(7) [1924] 1 K. B. 138, 142, 149.
(8) [1936] 1 K. B. 169, 183, 189.
(9) (1816) 7 Taunt. 246.
(10) [1929] 1 K. B. 470.
(11) [1908] 2 K. B. 696.
(12) [1924] A. C. 522.

I submit the shipowner here has failed to perform the obligation imposed on him by law to include the terms of the paramount section of the Act in the bill of lading issued by him, and he cannot rely on his illegal contract.

C. B. Smith K.C. and *Cyril Miller* for the respondent. We submit (1.) that by the Act the rules apply, whether the paramount clause is expressly incorporated or not; (2.) if, as a result of failure to incorporate the clause expressly the bill of lading is illegal, no cause of action can arise from it; (3.) if the contract is illegal, the appellants cannot entirely disregard it and sue in tort, basing the action either on the custom of the Realm or any liability of a bailee, nor can he base his claim on any presumed antecedent oral contract. If there is any antecedent contract, it is discharged by performance on signing and accepting the bills of lading or it is merged in them, and the contract contained in and evidenced by them is the only contract. The shipper (the appellant sues as shipper and not as indorsee of the bill of lading) cannot, as the result of an illegal contract in which he has participated, get rights and immunities against the shipowner which he never dreamt of at the time he entered into the contract: *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.* (1)

The rights of the parties under the bills of lading here must be worked out, wherever the bills are construed, under English law: *James Clark* v. *Sree Mutty Doorgamoney Dossee.* (2) We cannot read into the section words such as, "If the express "statement is omitted, the rules shall cease to apply"; but that is what the contention of the appellant requires. The shipowner might be subjected to a penalty for violating the provisions of the Act, but that would not affect the rights of the other party. [*The Torni* (3) referred to.] The disobedience to the statute here was in form, not in substance, and the illegality, if any, would not have the effect of destroying the whole contract: *Sir Roger Kerrison* v. *Cole* (4) and *Kearney* v. *Whitehaven Colliery Co.* (5) If the rules do not apply, there is no obligation to insert the express statement, and there is no illegality in omitting it. If the contract is illegal, the Courts would not work out the rights of the parties on the basis of a resultant liability as if there had been no contract.

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(1) [1924] A. C. 522.
(2) (1840) 3 Moo. P. C. 252, 273.
(3) [1932] P. 78.
(4) (1807) 8 East, 231.
(5) [1893] 1 Q. B. 700, 710.

Cyril Miller followed. I submit the rules are incorporated in the contract notwithstanding the non-compliance with s. 3 of the Act. The contract is not illegal under the municipal law of Newfoundland. The rules are imported by the clause that the contract shall be governed by English law. A foreign Court would so read the contract and give effect to it.

[Reference was made to Dicey's Conflict of Laws, 4th ed., r. 155 (p. 591), r. 161 (p. 623), and r. 161, sub-r. 3 (p. 631); *Chatenay* v. *Brazilian Submarine Telegraph Co.* (1); *The Torni* (2); *Dobell & Co.* v. *Steamship Rossmore Co.* (3); *Mahmoud* v. *Ispahani* (4); and *Taylor* v. *Chester.* (5)]

W. L. McNair replied. If the rules will not necessarily and in every event be given effect to in a foreign Court, that shows that the provisions of s. 3 of the Act are mandatory. [Reference was made to Scrutton, 11th ed., p. 481, and App. V. and VI., and to *Angliss & Co., Australia (Proprietary), Ld.* v. *Peninsular and Oriental Steam Navigation Co.* (6)] When it is said that the bill of lading shall be governed by English law, it means by such law as the English Courts would apply as being the proper law of the contract. The respondent's contention sets the whole scheme of the Newfoundland shipping legislation at naught.

1939. Jan. 30. The judgment of their Lordships was delivered by LORD WRIGHT. This appeal arises out of a claim made against the respondent, a body corporate incorporated under the law of Nova Scotia, now in liquidation, as owner of the motor vessel *Hurry On* registered at the port of Halifax, Nova Scotia. The claim was made by the appellant, a body corporate carrying on business at New York, in the United States, for damage and loss suffered in respect of consignments of herrings which were being carried in the *Hurry On* from Middle Arm, Newfoundland, to New York, and were delivered in a damaged condition.

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(1) [1891] 1 Q. B. 79.
(2) [1932] P. 78.
(3) [1895] 2 Q. B. 408, 413.
(4) [1921] 2 K. B. 716, 726, 728, 730.
(5) (1869) L. R. 4 Q. B. 309, 311 313.
(6) [1927] 2 K. B. 456, 459.

In January, 1935, the *Hurry On* was put up as a general ship for the carriage of cargo, including herrings, from Newfoundland ports to New York. Middle Arm was one of these ports. At that port there were loaded in the *Hurry On* three lots of herrings in barrels for carriage to New York. The appellant purchased the herrings from M. G. Basha, whose name appears on the bills of lading. It is not clear when the property passed, but so far as concerns this case the appellant may be treated as owner of the herrings at all material times. Bills of lading were issued on behalf of the ship. They were dated Middle Arm, January 15, 1935, and acknowledged receipt on board of the goods in apparent good order and condition from M. G. Basha, and provided for delivery in the like apparent good order and condition at New York, " unto order Commercial National Bank and "Trust Co., notify Vita Food Products, New York, or his "or their assigns." W. A. Shaw acted for the ship as broker or agent in Newfoundland to secure the cargo, and J. Poole acted as a sort of super cargo, and signed the bills of lading for the ship. By some error or inadvertence the bills of lading so signed by Poole were old ones used outside Newfoundland by Shaw at other ports for other vessels, and did not incorporate the Hague Rules, which had been adopted by the Carriage of Goods by Sea Act enacted in Newfoundland in 1932. It is this fact or accident which has led to the questions agitated in this case.

The *Hurry On* sailed from Middle Arm on January 16, 1935, bound for New York with the herrings on board. On January 18, 1935, she ran into bad weather and ice off the coast of Nova Scotia. The captain decided to make for a port of refuge, but in the attempt to do so ran ashore at Grady Point in Nova Scotia in a gale of wind. The ship was eventually got off and taken to Guysboro, where the herrings were

J. C.
1939
VITA FOOD PRODUCTS, INC.
v.
UNUS SHIPPING CO.

unloaded, reconditioned and forwarded by another ship to New York. At New York the appellant took delivery of the herrings in their damaged condition under the bills of lading and paid freight, and then claimed for the damage to the herrings and for salvage and other expenses. The allegation in the action that the ship was unseaworthy was rejected by the Courts in Canada and need not now be considered; it is, however, admitted that the loss was due to the captain's negligence in navigation. The provisions either of the bills of lading or of the Carriage of Goods by Sea Act would exempt the respondent from liability for a loss due to negligence, but it was contended on various grounds to be discussed later that, as the Act had not been complied with, the exceptions did not avail the respondent, and that it was subject to the liabilities of a common carrier. This contention was rejected by the Chief Justice of Nova Scotia, where the action was brought, and also by the Supreme Court of the Province. In addition the Supreme Court held that if the bills of lading were illegal, the parties were in pari delicto and on that ground also the action must fail.

The bills of lading are in identical terms except as to the description of the goods included in each parcel, and it will be convenient to begin by stating briefly the substance of them and of the Act. The bills of lading contained, as already stated, an acknowledgment that the goods had been received on board for carriage to New York, with a proviso that they should be at shipper's risk while at the dock pending loading. There was a later clause by which in accepting the bill of lading the shipper, consignee and holder of the bill of lading agreed to be bound by all its stipulations as fully as if the shipper, consignee or holder had signed it. The bill of lading set out in detail the "Terms and Conditions of this Contract Bill of "Lading which are hereby mutually agreed upon as follows." These terms and conditions, so far as material, may be briefly summarized. There were the usual exceptions of sea and other perils, and the usual exemptions of specified classes of damage such as leakage, breakage and so forth. Of these latter clause 7 is specially material in this case. It contains a general exemption in respect of the goods carried from liability for all damage capable of being covered by insurance, and from liability above a certain value per package unless a special declaration is made. There follows a wide general exemption of loss or damage due to negligence of the shipowners' servants at or after the commencement of the voyage, or to unseaworthiness, provided all reasonable means had been taken to provide against it. General average was to be settled according to York Antwerp Rules, 1924, and adjusted in the country selected by the owners. The same clause also provided that "This contract shall be governed by English law." By clause 8 the liability of the goods to contribute to general average and similar charges was not to be affected though the necessity for that contribution was due to negligence or unseaworthiness, provided, however, that due diligence was exercised to make the ship seaworthy and properly manned, equipped or supplied. By clause 22 no claim was to be admitted unless made in writing within fifteen days after delivery or failure to deliver the goods. Provision was also made that in the case of shipments from the United States the Harter Act of 1893 was to apply. It was also stipulated that, save as so provided, the bill of lading was subject to the terms and provisions of and exemptions from liability contained in the then unrepealed Canadian Water Carriage of Goods Act, 1910, and the clause of that Act which declared illegal, null and void any clauses exempting the shipowners from liability save in accordance with the provisions of that Act was specifically incorporated. The Canadian Act only applies to shipments of goods from any port in Canada, whether to ports in Canada or ports outside Canada, and accordingly prima facie would not apply to a shipment from Newfoundland. In any event the incorporation of the Canadian Act, like the incorporation of the Harter Act, would only have effect as matter of contract on the principles laid down in *Dobell* v. *Steamship Rossmore Co.* (1)

The Newfoundland Act, passed in 1932, recited that it is expedient that the rules agreed to as a draft convention for the unification of certain rules relating to bills of lading by the delegates of a number of States, including the delegates representing His Majesty at the International Conference on Maritime Law held at Brussels in October, 1922, and afterwards amended at a further conference at Brussels in October, 1923, should, subject to the provisions of the Act, "be given "the force of law with a view to establishing the responsibilities, "liabilities, rights and immunities attaching to carriers under "bills of lading."

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(1) [1895] 2 Q. B. 408.

Of the sections of the Act, it is necessary to set out ss. 1 and 3 in full. They are as follows:—

Sect. 1: "Subject to the provisions of this Act, the rules "shall have effect in relation to and in connection with the "carriage of goods by sea in ships carrying goods from any "port in this Dominion to any other port whether in or outside "this Dominion."

Sect. 3: "Every bill of lading or similar document of title "issued in this Dominion which contains or is evidence of "any contract to which the rules apply shall contain an express "statement that it is to have effect subject to the provisions of "the said rules as expressed in this Act."

Sects. 4, 5 and 6, sub-s. 3, contain certain provisions to which the rules are subject. Sect. 7 gives any Court in Newfoundland having jurisdiction to the amount claimed power to try any action for loss or damage to goods carried by sea to or from the Dominion of Newfoundland, notwithstanding any stipulation in the bill of lading or similar document.

The rules which are thus given the force of law are set out in full in the Schedule to the Act. These rules, often called the Hague Rules, are identical with those scheduled to the British Carriage of Goods by Sea Act, 1924, and have now been adopted with or without modifications by certain foreign States, including recently the United States, and also by the Crown Colonies, by Australia, by Canada, and by New Zealand. They confer rights and immunities and also impose liabilities upon the shipowner; liabilities which he cannot escape, since art. III. (8.) avoids any clause or agreement relieving the carrier from the liability for negligence imposed by the rules or lessening that liability. But the Act and rules only apply where a bill of lading is issued and there is no provision making it imperative for the carrier to issue a bill of lading save on demand of the shipper.

If the rules are compared with the provisions of the bills of lading in suit, they agree in substance in respect of the relevant matters—namely, liability in respect of negligence and unseaworthiness. In some respects the rules go beyond the bills of lading, as for instance where they provide that the carrier is to be released from liability if suit is not brought within one year after delivery has been or should have been made. In other respects the bills of lading contain provisions which are outside the scope of the Act and rules. The bills of lading are furthermore documents of title which define the contractual voyage and provide for general average and for the obligation to deliver the goods which are received at the dock and actually loaded. Moreover they expressly stipulate that the proper law of the contract is to be English law. It is necessary to bear such matters in mind when the central questions in the case are being considered, that is, the questions whether the failure to obey s. 3 of the Act is illegal under the law of Newfoundland, the place where the contract was made, and whether that failure renders the contract void in the Courts of Nova Scotia, and in either event what is the resultant legal position. The learned Chief Justice held that notwithstanding the non-inclusion of the clause paramount (by which is meant the clause specified in s. 3) the bills of lading were effective documents but are subject to the exemptions, not of the bills themselves, but to those prescribed in the rules, and that in the circumstances the latter exemptions gave a good defence to the shipowner so that the action failed. The Supreme Court also held that the action failed, but reached that conclusion by a different route. The reasoning of the learned judges did not in all respects agree, but in substance they held that disobedience to s. 3 constituted an illegality in which both parties were equally concerned, and accordingly the action failed whether laid in contract or in tort. They held that the appellant's arguments involved it in a dilemma,

J. C.
1939
Vita Food Products, Inc.
v.
Unus Shipping Co.

either the bills of lading were good or they were illegal. In either event the suit failed.

Their Lordships are of opinion that the bills of lading were not illegal, and must be accepted as valid documents by the Courts of Nova Scotia. The precise meaning of this statement, however, and the reasoning on which it is based require elucidation.

The first question to determine is the true construction of ss. 1 and 3 of the Act. Sect. 1 provides for the application of the rules to every bill of lading for the carriage of goods by sea in ships from any port in Newfoundland to any other port, whether in or outside that Dominion. The appellant contended that since s. 1 only provided that the rules should have effect "subject to the provisions of this Act," the rules could not apply to a bill of lading unless the terms of s. 3 were complied with. Their Lordships do not so construe the section. In their opinion the words "subject to the provisions of "this Act" merely mean in this connection that the rules are to apply but subject to the modifications contained in ss. 2, 4, 5 and 6, sub-s. 3, of the Act. To read these words as meaning that the rules are only to have effect if the requirements of s. 3 are complied with, would be to put an unnecessarily wide interpretation upon them instead of the narrower meaning, which is more natural and obvious. In their Lordships' judgment s. 1 is the dominant section. Sect. 3 merely requires the bill of lading to contain an express statement of the effect of s. 1. This view of the relative effect of the sections raises the question whether the mandatory provision of s. 3, which cannot change the effect of s. 1, is under Newfoundland law directory or imperative, and, if imperative, whether a failure to comply with it renders the contract void, either in Newfoundland, or in Courts outside that Dominion.

It will be convenient at this point to determine what is the proper law of the contract. In their Lordships' opinion the express words of the bill of lading must receive effect, with the result that the contract is governed by English law. It is now well settled that by English law (and the law of Nova

Scotia is the same) the proper law of the contract "is the law "which the parties intended to apply." That intention is objectively ascertained, and, if not expressed, will be presumed from the terms of the contract and the relevant surrounding circumstances. But as Lord Atkin, dealing with cases where the intention of the parties is expressed, said in *Rex* v. *International Trustee for, etc., Bondholders A.-G.* (1) (a case which contains the latest enunciation of this principle), "Their intention will be ascertained by the intention "expressed in the contract if any, which will be conclusive." It is objected that this is too broadly stated and that some qualifications are necessary. It is true that in questions relating to the conflict of laws rules cannot generally be stated in absolute terms but rather as prima facie presumptions. But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy. In the present case, however, it might be said that the choice of English law is not valid for two reasons. It might be said that the transaction, which is one relating to the carriage on a Nova Scotian ship of goods from Newfoundland to New York between residents in these countries, contains nothing to connect it in any way with English law, and therefore that choice could not be seriously taken. Their Lordships reject this argument both on grounds of principle and on the facts. Connection with English law is not as a matter of principle essential. The provision in a contract (e.g., of sale) for English arbitration imports English law as the law governing the transaction, and those familiar with international business are aware how frequent such a provision is even where the parties are not English and the transactions are carried on completely outside England. Moreover in the present case the *Hurry On*, though on a Canadian register, is subject to the Imperial statute, the

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(1) [1937] A. C. 500, 529.

J. C.
1939
VITA FOOD PRODUCTS, INC.
v.
UNUS SHIPPING CO.

Merchant Shipping Act, 1894, under which the vessel is registered, and the underwriters are likely to be English. In any case parties may reasonably desire that the familiar principles of English commercial law should apply. The other ground urged is that the choice of English law is inconsistent with the provisions of the bill of lading, that in respect of certain goods the Harter Act or the Canadian Water Carriage of Goods Act of 1910 (now repealed, but in force at the date of the bill of lading) was to apply. It has been explained that the incorporation of these Acts may have only contractual effect, but in any case, though the proper law of the contract is English, English law may incorporate the provisions of the law of another country or other countries as part of the terms of the contract, and apart from such incorporation other laws may have to be regarded in giving effect to the contract. The proper law of the contract does indeed fix the interpretation and construction of its express terms and supply the relevant background of statutory or implied terms. But that part of the English law which is commonly called the conflict of laws requires, where proper, the application of foreign law; e.g., English law will not enforce a performance contrary to the law of the place of performance in circumstances like those existing in *Ralli Bros.* v. *Compania Naviera Sota y Aznar* (1), and the law of the place of performance, though it will not be effective to affect the construction of the contract in regard to its substance (which must be ascertained according to the rule of the proper law, as was held in *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (2)), will still regulate what were called in that case the incidents and mode of performance in that place. English law will in these and sometimes in other respects import a foreign law, but the contract is still governed by its proper law. The reference to the United States and the Canadian Acts does not on any view supersede English law which is to govern the contract, nor does Newfoundland law, though Newfoundland was the place where the contract was made, apply to oust

(1) [1920] 2 K. B. 287.
(2) (1883–4) 12 Q. B. D. 589.

English law from being the law of the contract, and as such from being the law which defines its nature, obligation and interpretation, though Newfoundland law might apply to the incidents of performance to be done in Newfoundland. There is, in their Lordships' opinion, no ground for refusing to give effect to the express selection of English law as the proper law in the bills of lading. Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with s. 3 of the Act.

If, however, by reason of this failure to obey the Act the bills of lading were illegal in Newfoundland, it would not follow as a necessary consequence that a Nova Scotian Court, applying the proper law of the contract, would in its own forum treat them as illegal, though the position of a Court in Newfoundland might be different, if it held them illegal by Newfoundland law. A Court in Newfoundland would be bound to apply the law enacted by its own Legislature, if it applied, and thus might treat the bills as illegal, just as the Supreme Court in the United States treated as void an exemption of negligence in a bill of lading issued in the United States, though in relation to the carriage of goods to England in an English ship: *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.* (1) Such a clause, it was held, was against public policy and void by the law of the United States, which was not only the law of the forum but was also held to be the proper law of the contract. This decision may be contrasted with *In re Missouri Steamship Co.* (2), where in similar circumstances the Court of Appeal, holding the proper law of the bill of lading to be English, held that English law did not apply the American rule of public policy, though the shipment took place in America and the bill of lading was issued there, and that the clause, being valid in English law, must receive effect.

With these considerations in mind it is necessary first to consider if the bills of lading are illegal by Newfoundland law. If they are not, the question of illegality cannot arise in the Courts of another jurisdiction, e.g., those of Nova Scotia. Illegality is a concept of so many varying and diverse applications, that in each case it is necessary to scrutinize the particular circumstances with precision in order to determine if there is illegality and if so what is its effect. As Lord Campbell said in reference to statutory prohibitions in *Liverpool Borough Bank* v. *Turner* (1): "No universal rule "can be laid down for the construction of statutes, as to "whether mandatory enactments shall be considered directory "only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get "at the real intention of the legislature by carefully attending "to the whole scope of the statute to be construed."

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(1) (1889) 129 U. S. 397.

(2) (1888) 42 Ch. D. 321.

In that case the Court, by a careful examination of the object of the Act and the public importance of compliance with it, held the transfer of a vessel to be a nullity for breach of a registration law. The same result has been reached in other cases, some of which have been cited in argument where breaches of statutes were held to nullify the transactions in question, even without express words of nullification. On the other hand, cases can be cited where the contract was not avoided by some particular illegality, e.g., *Kearney* v. *Whitehaven Colliery Co.* (2), where an illegality in a certain respect in an agreement of employment was held not to vitiate the whole contract. Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

Are there such grounds for holding that the Newfoundland law does in Newfoundland nullify bills of lading such as those in question? In their Lordships' opinion there are not. The matter can be tested by asking what would be the position if a bill of lading set out in extenso the exact provisions of the rules, but failed to contain an express statement in

(1) 2 De G. F. & J. 502, 507.

(2) [1893] 1 Q. B. 700.

compliance with s. 3, that the provisions of the rules applied to it. Surely such a bill of lading could not be regarded as illegal. Or again, what is the position where not only is a shipment made in a Newfoundland port but the port of delivery also is in Newfoundland? In such a case s. 1, by its own force, imports the rules, and s. 3 is merely an intimation of what, if the parties concerned are all residents or natives of Newfoundland and bound by that law, they must be taken to be aware. At least this is the position if Newfoundland law governs the contract. It seems impossible to hold that in such cases the bills of lading would be illegal and void. If that is so of a transaction beginning and ending in Newfoundland, and if such a transaction is not illegal, their Lordships do not think that such a transaction is to be treated as illegal because the place of delivery is outside Newfoundland and the parties or some of them are outside that Dominion and are not bound by its laws. It is said that the rules are not made part of the contract save when there is an express clause in the contract stating that they are to apply as provided in s. 3, and that to hold the bills of lading legal and effective documents without such a clause would frustrate the purpose of the Hague Rules and of the International Conference, which aims at an obligatory unification of bills of lading all over the world, at least so far as particular nations adopt them. The Act, however, does not in terms provide that the bill of lading is to be deemed illegal and void merely because it contravenes s. 3, nor does it impose penalties for failure to comply with s. 3, nor does it in terms expressly prohibit the failure. Indeed there is nothing to prevent a contract of sea carriage in respect of which there is no bill of lading at all: see *Harland & Wolff* v. *Burns*. (1) The inconveniences that would follow from holding bills of lading illegal in such cases as that in question are very serious. A foreign merchant or banker could not be assumed to know or to inquire what the Newfoundland law is, at any rate when the bill of lading is not expressed to be governed by Newfoundland law and still less when it provides that it is governed by English law, and it would seriously impair business dealings with bills of lading if they could not be taken at their face value, and as expressing all the relevant conditions of the contract. It was partly for that reason that in *Dobell* v. *Steamship Rossmore Co.* (1) the Court of Appeal refused to treat the Harter Act as having any effect as a foreign law affecting the validity of the contract, but treated it only as part of the English contractual document which expressly embodied it. A bill of lading fulfils other functions than merely that of setting out the conditions of carriage. It is a document of title which if endorsed passes the property, and which, if money is advanced upon it, as is done in ordinary course of business, passes a special property by way of pledge to the banker or other lender. It would be a grave matter if business men when dealing with a bill of lading had in a case like the present to inquire into the foreign law ruling at the port of shipment.

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(1) 1931 S. C. 722.

All these reasons seem to justify the conclusion that the omission of what is called the clause paramount does not make the bills of lading illegal documents, in whole or in part, either within Newfoundland or outside it. Sect. 3 is in their Lordships' judgment directory. It is not obligatory, nor does failure to comply with its terms nullify the contract contained in the bill of lading. This, in their Lordships' judgment, is the true construction of the statute, having regard to its scope and its purpose and to the inconvenience which would follow from any other conclusion. If that is so, the bills of lading are binding according to their terms and consequently the respondent is entitled to succeed in its defence.

But on the basis that the bills of lading were illegal in Newfoundland in that their issue without the clause paramount was prohibited by the law of that country it was argued that no Court in any country would enforce their terms and exemptions, and the carriage would therefore be upon the terms implied where goods are taken for carriage by a common carrier, i.e., subject only to the exception of the Act of God and the King's Enemies. No further terms, it was said, could

(1) [1895] 2 Q. B. 408.

be implied nor could any reliance be put upon the provisions of the Hague Rules, since they had not been incorporated in the bills of lading by the insertion of the clause paramount. The appellant contended that, unless the clause was inserted, no contract between carrier and shipper which included the provisions of the Hague Rules was entered into. Nor could the Act be said to have incorporated them even in Newfoundland itself, since s. 1 only provided that the rules should have effect " subject to the provisions of this Act," a phrase which the appellant maintained meant (inter alia) that the rules were not incorporated unless the provisions of s. 3 were complied with. For reasons already explained their Lordships do not so construe the section.

But whatever view a Newfoundland Court might take, whether they would hold that the contracts contained in the bills of lading must be taken to have incorporated the Hague Rules or whether they would hold them to have been illegal, the result would be the same in the present case, where the action was brought not in a Newfoundland but in a Nova Scotian Court. It may be that, if suit were brought on these bills of lading in a Newfoundland Court, and the Court held they were illegal, the Court would refuse to give effect to them, on the basis that a Court is bound to obey the laws of its own Legislature or its own common law, as indeed the United States Supreme Court did in *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.* (1) But it does not follow that any other Court could properly act in the same way. If it has before it a contract good by its own law or by the proper law of the contract, it will in proper cases give effect to the contract and ignore the foreign law. This was done in the *Missouri* case (2), both by Chitty J. and by the Court of Appeal. Lord Halsbury, having stated that the contrary view would mean that no country would enforce a contract made in another country unless their laws were the same, said (3): " that there may be stipulations "which one country may enforce and which another country

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(1) 129 U. S. 397.
(2) (1888) 42 Ch. D. 321.
(3) Ibid. 336.

"may not enforce, and that to determine whether they are "enforceable or not you must have regard to the law of the "contract, by which I mean the law which the contract itself "imports to be the law governing the contract." Having held that the law of the contract was English, he went on to hold that the exception of negligence, even if of no validity in the place where made, must receive effect in English law, although the exception of negligence was invalid in the United States as being against the public policy of that country, and although to do an act contrary to public policy is one type of illegal action. The same attitude is illustrated in *Dobell* v. *Steamship Rossmore Co.* (1), where the Harter Act, which declares certain stipulations to be unlawful and imposes penalties on shipowners inserting them in bills of lading, was not considered as affecting the English contract as a part of the contract where its provisions were infringed, save so far as it was expressly incorporated. Foreign law was also disregarded in *Trinidad Shipping Co.* v. *G. R. Alston & Co.* (2), where the contract was an English contract and payment of certain rebates on freight were rendered illegal by the law of the United States, where the freight was payable. From the rule which he states Lord Halsbury in the *Missouri* case puts aside: " questions in which the positive law of the country "[sc. the foreign country] forbids contracts to be made. "Where a contract is void on the ground of immorality, or is "contrary to such positive law as would prohibit the making "of such a contract at all, then the contract would be void "all over the world, and no civilised country would be called "on to enforce it." In this passage Lord Halsbury would seem to be referring to matters of foreign law of such a character that it would be against the comity of nations for an English Court to give effect to the transaction just as an English Court may refuse in proper cases to enforce performance of an English contract in a foreign country where the performance has been expressly prohibited by the public law of that country. The exact scope of Lord Halsbury's

(1) [1895] 2 Q. B. 408. (2) [1920] A. C. 888.

proviso has not been defined. There may also be questions in some cases as to the effect of non-performance of conditions which by the foreign law of the place where a contract was entered into are essential to its formation, though even in that case the validity of the contract may depend on its proper law. But whatever the precise ambit of that saving expression, it is clear that it does not apply to such a statutory enactment as s. 3, even if disobedience to it were regarded as rendering the bill of lading in some sense illegal.

It is, however, necessary before parting with this aspect of the case to consider whether *The Torni* (1) (in which the Court of Appeal affirmed the judgment of Langton J.) should be applied, as the respondent's counsel contend it should, in the respondent's favour. The bills of lading in that case had been issued in Palestine, a territory over which His Majesty held a mandate. Two bills of lading, the only bills material in the case, had been endorsed to Hull merchants. The shipment was to Hull. The question was whether these bills of lading were to be construed according to their actual terms or whether those terms were supplemented or supplanted by the Hague Rules, there being a Sea Carriage of Goods Ordinance in Palestine corresponding to the Newfoundland Act. There were certain differences between that case and the present. One was that the bills of lading had a clause providing that they were " to be construed in accordance with English law " not as in the present case " shall be governed by English law." In their Lordships' judgment that distinction is merely verbal and is too narrow to make a substantial difference. The construction of a contract by English law involves the application to its terms of the relevant English statutes, whatever they may be, and the rules and implications of the English common law for its construction, including the rules of the conflict of laws. In this sense the construing of the contract has the effect that the contract is to be governed by English law. In addition, even apart from that term (and a fortiori with it) the form of the bill of lading would point to it being an English contract: *The Industrie.* (2) The law of the flag was Esthonian, which was not likely to be taken as the proper law of the contract. The other distinction was in s. 4 of the Palestine Ordinance which corresponded to s. 3 of the Newfoundland Act. The former section, which was otherwise identical with s. 3, contained the additional words "and shall be deemed to have effect subject thereto, notwith-"standing the omission of such express statement.". In view of the effect of s. 1 as construed by their Lordships the additional words seem to them to add nothing in substance. The indorsees were claiming in the action for damage and short delivery, and the question was set down for trial as a preliminary issue whether the bills of lading were subject to the provisions of the Ordinance. The Court of Appeal held that they were. The grounds of this decision were that the bills would have been illegal because they did not contain the stipulated express clause had it not been for the fact that its omission was immaterial, because by the law of Palestine the clause was incorporated whether expressly inserted or not and the bills of lading were therefore legal. It was also held that the stipulation that the contract should be construed by English law did not mean that English law should be the proper law of the contract but merely that English rules of construction, as contrasted with English substantive law, should apply. The law of Palestine was the substantive law to be applied and governed the contract.

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(1) [1932] P. 78.

(2) [1894] P. 58.

As already indicated their Lordships do not agree with this view. With the greatest respect to the Court of Appeal their Lordships are of opinion that the decision is contrary to the principles on which they have proceeded in the previous part of this judgment and that it cannot be supported. The Palestine Ordinance, so far as appears, did not any more than the Newfoundland Act make the contract illegal so as to nullify the contract. There was no sufficient ground for refusing to give effect to the express or implied intention of the parties that the proper or substantive law of the contract, that is the law by which it was to be enforced and governed, should be English law. To do so is to contravene the fundamental principle of the English rule of conflict of laws that intention is the general test of what law is to apply. The effect of the judgment seems to be to read the bill of lading as if it expressly provided that it was to be governed by the law of Palestine. Nor does the Court of Appeal seem to have had its attention directed to the prima facie rule that an English Court dealing with a contract made in a foreign jurisdiction, as Palestine was, must first ascertain what was the bargain of the parties and give effect to that bargain unless debarred by some provision of the foreign law which binds the Court. In general, for reasons already explained, legislative provisions such as those in question do not have extra-territorial effect and do not debar the Court from giving effect to the bargain of the parties. The exceptions to this general rule do not apply here. It may be that a Court in Palestine, bound to give effect to the laws under which it exercises jurisdiction, might arrive at a different conclusion. No opinion can here be expressed on that matter nor would it be material in considering the effect which a Court outside Palestine should give to the contract. Nor is it necessary to consider what the position would have been if the bills of lading had expressed that they were governed by the law of Palestine. Their Lordships do not think that they should follow or apply the reasoning in *The Torni.* (1)

A further question strenuously argued on the assumption that the bills of lading were illegal and void was that the appellant was entitled to recover in tort against the respondent as a bailee, which had no contractual protection but was simply liable for its admitted negligence whether as common carrier or bare bailee. As the assumption, in their Lordships' judgment, fails, the question does not arise. It may, however, be pointed out that, if there were illegality in respect of the bills of lading, both parties would be in pari delicto. In a case like this, the bills of lading contain the contract. On that footing they are issued by the shipowner and accepted by the shipper, as indeed the bills expressly state. The question of illegality would not depend on pleading or procedure or who first might or should

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(1) [1932] P. 78.

J. C.
1939
Vita Food Products, Inc. v. Unus Shipping Co.

produce the documents. It would be a question of substance, of which if necessary the Court would of its own motion take cognizance and to which the Court would give effect. Furthermore, though there may be cases in which an action may be brought indifferently either in contract or in tort, this is not such a case. The actual transaction between the parties cannot be ignored even in an action in tort. The transaction includes as an essential part the bills of lading whether regarded from the point of view of the contractual exceptions or of illegality. To apply the language of Lord Sumner in the *Elder Dempster* case (1) there is not here a bald bailment with unrestricted liability, or tortious handling independent of contract. Such a view would be a travesty of fact. Hence even on that footing the respondent would fail, either because it was party to an illegality avoiding the contract or alternatively because the contractual exemptions could not be ignored.

Their Lordships are of opinion that the appeal should be dismissed with costs and will humbly so advise His Majesty.

Solicitors for the appellant: *Ince, Roscoe, Wilson & Glover.*

Solicitors for the respondent: *Botterell & Roche.*

(1) [1924] A. C. 522, 564.

J. C.*
1939
Feb. 23.

RAJA VYRICHERLA NARAYANA GAJAPATIRAJU . . . . } APPELLANT;

AND

THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM . . . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Land acquisition—Compulsory acquisition—Potentialities—Acquiring authority sole possible purchase of potentiality—Valuation—Land Acquisition Act (*I. of* 1894), *ss.* 23, 24.

Land compulsorily acquired must be valued not merely by reference to the use to which it is being put at the time at which its value has to be determined, but also by reference to the uses to which it is reasonably capable of being put in the future.

Where the land has unusual features or potentialities, the Valuing Officer must ascertain as best he can from the materials before him the price a willing purchaser would pay for the land with those features or potentialities. The owner is entitled to, and the Valuing Officer must, ascertain the value of the potentialities, even when the only possible purchaser of the potentialities is the authority purchasing under powers enabling compulsory acquisition.

Glass v. *Inland Revenue* 1915 S. C. 449; *Inland Revenue Commissioners* v. *Clay* [1914] 1 K. B. 339, 348; *In re Gough and The Aspatria, Silloth and District Joint Water Board* [1904] 1 K. B. 417; *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* [1914] A. C. 569, 576; *Fraser* v. *Fraserville* (*City of*) [1917] A. C. 187, 194; and *Sidney* v. *North Eastern Ry. Co.* [1914] 3 K. B. 629 referred to.

Dictum of Fletcher Moulton L.J. in *Lucas and Chesterfield Gas and Water Board* [1909] 1 K. B. 16, p. 31 disapproved.

Judgment of High Court on principle of valuation of potentialities reversed.

APPEAL (No. 36 of 1938) from a decree of the High Court (May 4, 1937) which reversed an award of the Subordinate Judge of Vizagapatam on a reference under the Land Acquisition Act (September 11, 1933).

A harbour was being constructed at Vizagapatam. Land acquired by the harbour authorities on the south of the harbour was allocated by them to oil companies and other industrial concerns. This land was malarious.

* *Present:* LORD MACMILLAN, LORD ROMER, and SIR GEORGE RANKIN.

Reported by C. Sidney Smith, Esq., Barrister-at-Law.

J. C.
1939
Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam.

The appellant's land, which was to the south of this land, contained a spring which yielded a constant and abundant supply of good drinking water which could easily be made available for the oil companies and people engaged in the harbour works.

The appellant's land was acquired for the purpose of the execution of anti-malarial works.

The appellant claimed compensation on the footing of the potentialities of the land as a building site. The Land Acquisition Officer disallowed this claim and awarded compensation on a valuation of the land as partly waste and partly cultivated with an allowance for some buildings and trees.

On the appellant's application, the matter was, under the Act, referred to the Subordinate Judge. Before him the appellant made a further claim on the footing of potentialities as a source of water supply.

The Subordinate Judge held that the water could be sold to the oil companies and others at a profit, that the only possible buyers were the oil companies and the harbour authorities and that compensation for potentialities could be awarded, even where the only possible buyer is the acquiring authority, and he assessed the value of the potentialities and made his award accordingly. He found against the potentialities of the land as a building site.

On appeal, the High Court set aside the award of the Subordinate Judge and restored that of the Land Acquisition Officer, holding that the supply of drinking water had no value apart from the scheme for which the acquisition was made and the Harbour Authorities were the only possible purchasers, and that the land had no potentialities as a building site.

The facts are more fully stated in the judgment of their Lordships.

1938. Nov. 14, 15, 17, 18, 21, 22. *Lionel Cohen K.C.*, *P. V. Subba Row* and *K. Umameshwaram* for the appellant referred to ss. 3, 4, 5 (*a*), 7, 9, 11, 15 to 19, 23 to 25, 31, sub-s. 2, and

J. C.
1939
VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

s. 53 of the Land Acquisition Act and the facts which led to the acquisition of the land in question and submitted: In assessing the value of land, its potentialities must be taken into consideration. We are now concerned with the potentialities of the land in question only as a source of water supply, there being concurrent findings against its potentialities in other respects. This land was not included in the original harbour scheme in 1920. That is a fact which should be taken into consideration. A supply of water was wanted in connection with an anti-malarial scheme on the south of the harbour. This land held the only available source of supply on the south. It could give a constant supply of good drinking water at a comparatively small cost. A scheme to bring water from the north had been considered and abandoned on account of its prohibitive cost. The water supply from this land would be available for the oil companies and other concerns that might be established on the south of the harbour as well as the anti-malarial scheme. The special adaptability or potentialities of the land in these circumstances should be taken into account in assessing the " market value " which is the value to the owner: *Swarna Manjuri Dassi* v. *Secretary of State for India.* (1) Not merely the present value, but potentialities must be considered: *Mohini Mohan Banerjee* v. *Secretary of State for India* (2); *In re Gough and The Aspatria, Silloth and District Joint Water Board* (3) and on appeal. (4) You may look at the ultimate purchaser in estimating the potential value: *In re Lucas and Chesterfield Gas and Water Board* (5) and on appeal. (6)

In our submission, the rights of the owner are understated in *Sidney* v. *North Eastern Ry. Co.* (7)

The potentiality and not the realized possibility is the matter for consideration. In *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (8) and in *Sisters of Charity of Rockingham* v. *The King* (9) the arbitrator acted on the

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(1) (1927) I. L. R. 55 Cal. 994.
(2) (1921) 25 C. W. N. 1002.
(3) [1903] 1 K. B. 574.
(4) [1904] 1 K. B. 417.
(5) [1908] 1 K. B. 571.
(6) [1909] 1 K. B. 16.
(7) [1914] 3 K. B. 629.
(8) [1914] A. C. 569.
(9) [1922] 2 A. C. 315.

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

realized possibility and it was held he had applied a wrong principle. Where the principle applied is right, the Board will not examine the account: *Narasingh Das* v. *Secretary of State for India.* (1)

In my submission, the Subordinate Judge here has acted on right principles and has correctly applied them. The High Court has fallen into error in holding that the requirements of water for the harbour is not a matter to be taken into consideration. I submit that the possibility of requirement and not the actual requirement should be taken into consideration. The High Court has misdirected itself in stating the question as one of law. It is wrong to consider the Harbour Authorities as the only possible purchasers. The oil companies might have purchased.

It is immaterial that the land was, at the time, undeveloped. There was a possibility of developing it and that possibility must be taken into consideration. The owner himself might have developed and exploited it.

H. U. Willink K.C., *W. Wallach* and *W. W. K. Page* for the respondent. The water is of no value to the appellant as a potential source of supply outside his land. The possible buyer would not pay more for the land on account of the water supply if the harbour was not made. No allowance can be made for it: *Sidney* v. *North Eastern Ry. Co.* (2) and *Countess of Ossalinsky* v. *Manchester Corporation.* (3) [Reference was made to *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (4), *In re Gough and The Aspatria, Silloth and District Joint Water Board* (5), *In re Lucas and Chesterfield Gas and Water Board* (6), *Odlum and Others* v. *Vancouver* (*City of*) (7), *Fraser* v. *Fraserville* (*City of*) (8), *Vallabhdas Naranji* (*Khot of Kanjor*) v. *The Collector under Act I. of* 1894 (9), *Inland Land Revenue Commissioners* v. *Clay* (10), *Cedars Rapids*

(1) (1924) L. R. 52 I. A. 133, 136.

(2) [1914] 3 K. B. 629.

(3) Reported in Browne and Allan on Compensation, 2nd ed., Appendix, p. 659.

(4) [1901] A. C. 373.

(5) [1903] 1 K. B. 574; on appeal [1904] 1 K. B. 417.

(6) [1908] 1 K. B. 571; on appeal [1909] 1 K. B. 16.

(7) (1915) 85 L. J. P. C. 95; 113 L. T. 795.

(8) [1917] A. C. 187.

(9) [1929] 33 C. W. N. 549.

(10) [1914] 1 K. B. 339, 348.

Manufacturing and Power Co. v. *Lacoste* (1), and *Corrie* v. *MacDermott.* (2)]

Secretary of State for Foreign Affairs v. *Charlesworth, Pilling & Co.* (3) differs from this case. In that case all the land in the proximity of the railway went up in value.

The purpose for which the land is to be acquired ought not to be taken into account.

The valuation ought to be on the following principles :—

(1.) The exigencies of the purchaser must be excluded.

(2.) Public need cannot appreciate private competition.

(3.) Any value due to carrying out the purpose of the acquisition (here the harbour or malarial schemes) must be excluded.

(4.) Only the general value is to be given and not the particular value to the acquiring authority.

(5.) The general value must be based on possibility of competition.

On the facts of the present case, there is no evidence that any body other than the Harbour Authorities would have been in the market. The possibilities or potentialities must, therefore, be included on the principles laid down by Fletcher Moulton L.J. in *In re Lucas and Chesterfield Gas and Water Board.* (4)

W. W. K. Page followed. In India no one could purchase with a view to providing a water supply except a public body or some one licensed or authorized by Government, so there could be no competition. The value to the owner is to be ascertained under s. 4 of the Act on the footing of a voluntary transaction between a willing buyer and a willing seller, that is as between a purchaser not under compulsion to buy and a seller not under compulsion to sell. The value is not the value in use, but the value at a specified date. That value may be greater or less than the value calculated on the revenue obtained by the owner in the past or that might be obtained by him in the future, if he retained the property. Potentialities at the date of the sale may legitimately be taken

(1) [1914] A. C. 569.
(2) [1914] A. C. 1056, 1062.
(3) [1901] A. C. 373.
(4) [1909] 1 K. B. 16, 31.

J. C.
1939
VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

into account, but only so far as the owner can use them to influence a willing buyer. The price that might be offered by speculators on the date of the acquisition may be considered, but not the use to which the property will be put by the acquiring body after acquisition.

Lionel Cohen K.C. in reply. The evidence shows that a profit could be made by selling water to the community or settlement which would follow the making of the harbour. There is no prohibition against selling water in India. Profit that can be made is an element that can be taken into consideration: *Trent-Stoughton* v. *Barbados Water Supply Co., Ld.* (1)

This land was left out in the original scheme. The value of it rose on that scheme. The carrying out of anti-malarial work was a certainty. It began in 1926. Any purchaser might and would assume that this work would be carried out and a water supply would be a necessity. The supply from this land would be the cheapest and most convenient. It is said there was no possibility of another buyer. The value is the value to the owner. If deprived of the land, he is deprived of what he might earn. If the water were brought to the boundary of the harbour, would the Harbour Authorities forbid their workmen and tenants buying and using the water? "Urgency" has been referred to. "Urgency" in s. 24 means, I submit, urgency in point of time. It has that meaning in s. 17 clearly, and prima facie the word would bear the same meaning throughout the Act. In s. 24 only enhancement is considered, not initial potentiality. Proof of competition is not necessary. Competition affords one way of ascertaining the value, but that is not the only way. If there is no competition, the value must be ascertained in some other way, e.g., the profit the owner could get if he retained the land.

In every case in which *Lucas's* case (2) was approved, except in *Sidney's* case (3), it was approved not on the point raised here of absence of competition, but on the point not

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(1) [1893] A. C. 502, 504.
(2) [1909] 1 K. B. 16.
(3) [1914] 3 K. B. 629.

J. C.
1939
Vyricherla Narayana Gajapatiraju
v.
The Revenue Divisional Officer, Vizagapatam.

disputed that potential value may be considered. In *Sidney's* case (1) the reason given by Rowlatt J. is against me, but the decision is in my favour. [The other cases cited by the respondent were referred to.]

Willink K.C. replied on the point raised in *Trent-Stoughton* v. *Barbados Water Supply Co., Ld.* (2), and asked that s. 26 of the Act, which had not been referred to, might be considered.

1939. Feb. 23. The judgment of their Lordships was delivered by Lord Romer. This appeal is concerned with the question of what is the proper sum to be awarded to the appellant by way of compensation in respect of the compulsory acquisition by the Vizagapatam Harbour Authority of certain land of his adjoining the harbour, the respondent being the representative of such authority for the purposes of this appeal. The circumstances in which the land was acquired are as follows :

The Vizagatapam Harbour, the construction of which appears to have been begun in the year 1920, was formed by making excavations in swampy land situate to the south-west of the town of Vizagatapam and by dredging a deep water channel in the creek to the south of that town that led from the swampy land into the Bay of Bengal. On the south of the land acquired by the Harbour Authority for the purpose of these works is situated the property of the appellant known as the Lova Gardens. These gardens are formed by a valley which runs down from high ground on the south-west to low ground on the north-east adjoining the land of the Harbour Authority on the south of the above-mentioned creek. The upper portion of this valley consists of a shallow basin in the hills which forms the catchment area of a spring of water that emerges from the ground at the north-east end of the basin. This spring, which appears to yield even in the dry season an average flow of 50,000 gallons a day of excellent drinking water, is situated at a height of 150 feet above sea level. Until a part of it was diverted by the Harbour Authority, as narrated hereafter, the whole of the water from

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(1) [1914] 3 K. B. 629.

(2) [1893] A. C. 502.

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

this spring ran down the valley to the lower end of Lova Gardens and from thence discharged itself into the creek. By the early part of the year 1926 the construction of the harbour had made considerable progress and it was hoped that it would be ready for opening by the end of 1929. With that end in view a portion of the harbour site had been allocated by the Harbour Authority for the purpose of being used by oil companies and other industrial concerns. The entire south side of the harbour had indeed been allocated for industrial purposes. But the harbour land was very malarious, and so, too, was much of the land to the south of the harbour, including the lower part of the Lova Gardens ; a circumstance that gave rise to some anxiety in the minds of the Harbour Authority. They accordingly consulted Mr. Senior White, who is an expert upon the subject, and upon May 1, 1926, that gentleman, after making an " anti-malarial survey " of the area, embodied the results of his survey in a report. This report disclosed a serious state of affairs in the villages situated in the area of which there appear to have been at that time no less than thirty-two of which nine were on the south side of the creek. These villages, or many of them, seem to have been dependent upon wells for their water supply, and these wells formed breeding grounds for the malaria-bearing mosquitoes. It is plain from the report that persons carrying on business at the harbour would run a serious risk of contracting malaria as matters then stood, and this would greatly hamper the development of the harbour site for industrial purposes. Further, as Mr. White pointed out, there was the possibility of shipping at the quays becoming infected, and the mere possibility, which had already been suggested in the Indian press, was detrimental to the interest of the port. It appears from a letter written by Mr. Rattenbury, the Deputy Engineer in Chief to the Harbour Authority, dated July 14, 1926, that in these circumstances, Mr. White was " very keen on closing the wells along the " south side," and this, the letter adds, could be done if a gravity water supply were provided instead. Such a supply could be furnished by the spring at the upper end of Lova

J. C.
1939
VYRICHERLA NARAYANA GAJAPATIRAJU *v.* THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

Gardens, and accordingly the Harbour Authority conceived the idea of using the water from the spring for the purpose of freeing the harbour from malaria. But apart altogether from the assistance that this supply of water would give to the prevention of malaria, there was much to justify its acquisition on its own merits, as was pointed out in a letter of October 2, 1926, written by one of the harbour officials. For the water could be made available as a supply to the oil companies and other industrial concerns that might be established in the southern part of the harbour area. The method of utilizing the water for these purposes that was ultimately adopted was this: The water was to be diverted from the lower part of the valley to which reference has been made and led from a short distance below the spring directly to the harbour area by means of a tunnel to be made through the hilly land to the north-west of the valley. This scheme, which was in due course carried out and is now in operation, involved the acquisition from the appellant of the shallow basin forming the catchment area of the spring, the site of the spring itself, and a narrow strip of land below the spring. In due course the necessary steps were taken for the compulsory acquisition of this land under the provisions of the Land Acquisition Act, 1894, the notification under s. 4, sub-s. 1, of the Act being given on February 13, 1928. The public purpose for which the land was needed was stated in the notification to be the execution of anti-malarial works, the total area to be acquired from the appellant being 108·9 acres. Of this acreage the catchment area, including the site of the spring referred to as 2-1D and 2-1E, accounted for 105·92 acres, and the land below the spring referred to as 2-1B (0·53 acres), 2-1C (0·48 acres) and 2-3B (1·97 acres) accounted for the rest.

After the giving of the notification, and the procedure laid down in ss. 6, 7 and 8 of the Act having been followed, the Collector took the steps prescribed by ss. 9, 10 and 11 to determine the compensation that ought to be allowed to the appellant for his land. It is provided by s. 15 of the Act that in so doing, the Collector shall be guided by the provisions contained in ss. 23 and 24, and it will be convenient before

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

continuing this narrative to turn to these provisions. So far as material to the present purpose they are as follows :—

" 23.—(1.) In determining the amount of compensation to be "awarded for land acquired under this Act, the Court shall "take into consideration—

"first, the market-value of the land at the date of the "publication of the declaration relating thereto under "section 6 ;

"secondly, the damage sustained by the person interested, "by reason of the taking of any standing crops or trees "which may be on the land at the time of the Collector's "taking possession thereof ;

"thirdly, the damage (if any) sustained by the person "interested, at the time of the Collector's taking possession "of the land, by reason of severing such land from his other "land ;

"fourthly, the damage (if any) sustained by the person "interested, at the time of the Collector's taking possession "of the land, by reason of the acquisition injuriously "affecting his other property, moveable or immoveable, in "any other manner, or his earnings.

"24. But the Court shall not take into consideration—

"first, the degree of urgency which has led to the "acquisition ;

"secondly, any disinclination of the person interested to "part with the land acquired ;

" . . . .

"fifthly, any increase to the value of the land acquired "likely to accrue from the use to which it will be put when "acquired."

The general principles for determining compensation that are specified in these sections differ in no material respect from those upon which compensation was awarded in this country under the Lands Clauses Act of 1845 before the coming into operation of the Acquisition of Land (Assessment of Compensation) Act of 1919. As was said by Wadsworth J. when giving judgment in the High Court in the present case, "It is well settled that English decisions under the Lands

J. C.
1939
Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam.

"Clauses Act of 1845 lay down principles which are equally "applicable to proceedings under the Indian Act." The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent it should affect the compensation to be awarded, is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This, however, is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value far in excess of its "market value." But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at "the market price," to use the words of s. 23 of the Indian Act. It is perhaps desirable in this connection to say something about this expression "the market price." There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by "the market value" in s. 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features, as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the materials before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under s. 4, sub-s. 1), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that, in ascertaining its value, the possibility of of its being used for building purposes would have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that is embodied in s. 24, sub-s. 5, of the Act and is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.

But how is the increase accruing to the value of the land by reason of its potentialities or possibilities to be measured ? In the case instanced above of land possessing the possibility of being used for building purposes, the arbitrator (which expression in this judgment includes any person who has to determine the value) would probably have before him evidence of the prices paid, in the neighbourhood, for land immediately required for such purposes. He would then have to deduct from the value so ascertained such a sum as he would think proper by reason of the degree of possibility that the land

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

might never be so required or might not be so required for a considerable time. In the case, however, of land possessing potentialities of such an unusual nature that the arbitrator has not similar cases to guide him, the value of the land must be ascertained in some other way. In such a case, moreover, there will, in all probability, be only a very limited number of persons capable of turning the potentialities of the land to account.

If the owner of the land is the only person who can do so, the value to him must be ascertained by reference to what profit he might thereby have been able to derive from the land in the future. Take as an example the case of an owner of vacant land that adjoins his factory. The land possesses the potentiality of being profitably used for an extension of the factory. But the owner is the only person who can turn that potentiality to account. In valuing the land, however, as between him and a willing purchaser, the value to him of the potentiality would necessarily have to be included.

The same consideration will apply to cases where the owner is not the only person but merely one of the persons able to turn the potentiality to account. The value to him of the potentiality will not be less than the profit that would accrue to him by making use of it had he retained it in his own possession. But now take the case where the owner is himself unable to turn the potentiality to account whether by promotion of a company or otherwise. In such a case there may be several other persons who would be able to do so, or there may be only one. If there are more than one, it is recognized by all the authorities that have been cited to their Lordships, and seems to be consistent with common sense, that the owner is entitled to be paid the value to him of the potentiality, though the ascertainment of its value may in many cases be a matter of considerable difficulty.

It has been suggested that in order to ascertain it, the arbitrator is to hold an imaginary auction. But with all respect to those who have made the suggestion, their Lordships are unable to see how this is going to help the arbitrator.

J. C.
1939
VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

At such imaginary auction, all possible purchasers must, no doubt, be imagined as attending. They will include, therefore, persons who are in no way interested in the land's potentialities, and such persons will bid no higher price than the value of similar land without its potentialities. This value in this judgment is referred to as the "poramboke" value. But they will also include what may be called the purchasers of the potentialities. There may also be present some speculative buyers who will be willing to bid more than the "poramboke" value upon the chance of being able to resell to a purchaser of the potentiality at a profit. It would seem, however, logically, that such purchasers should be disregarded. For the object of the imaginary auction is to discover what a purchaser of the potentiality will be willing to pay for it, and this cannot depend upon the presence at the auction of persons willing to pay less, unless it be that such ultimate purchaser is to be considered willing to pay whatever fantastic price he may be forced up to by competition. And no one suggests this.

Proceeding, therefore, with the imaginary auction at which are present two classes of buyers—namely, the "poramboke buyers" and the "potentiality buyers,"—the former will disappear from the bidding as soon as the "poramboke" value has been reached, and the bidding will thereafter be confined to the "potentiality buyers." But at what figure will this bidding stop? As already pointed out it cannot be imagined as going on until the ultimate purchaser has been driven by the competition up to a fantastic price. For he is ex hypothesi a willing purchaser and not one who is by circumstances forced to buy. Nor can the bidding be imagined to stop at the first advance on the "poramboke" value. For the vendor is a willing vendor and not one compelled by circumstances to sell his potentiality for anything that he can get. The arbitrator will, therefore, continue the imaginary bidding until a bid is reached which, in the arbitrator's estimate, represents the true value to the vendor of the potentiality. The auction will, therefore, have been an entire waste of the arbitrator's imagination. If the value

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU v. THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

of the potentiality be Rs.X, the imaginary auction will have taken place to ascertain the value of X from the imaginary bidding, and all that can be said is that the bidding will stop at Rs.X.

The truth of the matter is that the value of the potentiality must be ascertained by the arbitrator on such materials as are available to him and without indulging in feats of the imagination.

Their Lordships would not have thought it necessary to deal with this question of the imaginary auction at such length, were it not for the fact that in the argument before them the respondent's counsel endeavoured to show, by reference to such an auction, that when there was only one possible purchaser of the potentiality the value of it to the vendor was nil—that is to say that the value of the land with the potentiality was substantially nothing in excess of its value without it. This argument, it may be observed, commended itself to Lord Cullen in the Scottish case of *Glass* v. *Inland Revenue* (1), referred to below, but was rejected by the majority of the Court.

Upon the question of the value of the potentiality where there is only one possible purchaser, there are some authorities to which their Lordships will have to refer. But dealing with the matter apart from authority it would seem that the value should be the sum which the arbitrator estimates a willing purchaser will pay and not what a purchaser will pay under compulsion. It was contended on behalf of the respondent that, at an auction where there is only one possible purchaser of the potentiality, the bidding will only rise above the "poramboke" value sufficiently to enable the land to be knocked down to that purchaser. But if the potentiality is of value to the vendor if there happen to be two or more possible purchasers of it, it is difficult to see why he should be willing to part with it for nothing merely because there is only one purchaser. To compel him to do so is to treat him as a vendor parting with his land under compulsion and not as a willing vendor. The fact is that the only possible purchaser of a potentiality is usually quite willing to pay for it. An instance of this is to be found in the case of *Inland Revenue Commissioners* v. *Clay*. (1) That was a case under s. 25, sub-s. 1, of the Finance (1909–1910) Act, 1910, and is not perhaps strictly relevant to the present case. The facts of it, however, are worth recalling. There was a house of which the value to anyone except certain trustees was no more than 750*l.* These trustees were the owners of a nurses' home which adjoined the house, and they were desirous of extending their premises. They accordingly purchased the house for 1000*l.*, the owner thus receiving 250*l.* for the potentiality his house possessed by reason of its position adjoining the nurses' home. It was held by the Court of Appeal that 1000*l.* was the value of the house to a willing seller. "To say," said Lord Cozens Hardy M.R., "that a small farm in the middle of a "wealthy landowner's estate is to be valued without reference "to the fact that he will probably be willing to pay a large "price, but solely with reference to its ordinary agricultural "value, seems to me absurd." Had the house in that case been acquired compulsorily by a railway company, or local authority under the provisions of the Lands Clauses Consolidation Act, 1845, before its purchase by the trustees, the house ought, in their Lordships' opinion, and for the reasons already given, to have been valued at 1000*l.* and not merely at 750*l.*

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(1) 1915 S. C. 449.

A case in many respects similar to *Clay's* case (1), is that of *Glass* v. *Inland Revenue*. (2) That also was a case arising under the Finance (1909–1910) Act, 1910, and was one where land of an agricultural value of 3379*l.* had been sold in 1911 to certain Water Commissioners for 5000*l.*, they being the only possible purchasers of the land for other than agricultural purposes. It was held that in valuing the land as on April 30, 1909, the possibility that the Commissioners might give more than the agricultural value for the land must be taken into consideration. In Lord Johnston's words, it was necessary in order to fix the value of the land on April 30, 1909, to ascertain "what is to be attributed to the probability of the "Water Commissioners, in the circumstances, desiring to "acquire the property, and what figure, in a friendly negotiation, "they would be expected to pay for it."

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(1) [1914] 1 K. B. 339, 348.

(2) 1915 S. C. 449.

But however this may be, it is said that the matter assumes a totally different complexion when the only possible purchaser is the one who has obtained the compulsory powers of purchase, and that this has been established by authorities that should be followed by this Board. Of these authorities, the first one to which reference need be made is that of *In re Gough and The Aspatria, Silloth and District Joint Water Board.* (1) In that case it was not proved that the acquiring authority was the only possible purchaser and it may be that all that the Court of Appeal decided was that it was not incumbent upon the claimant for compensation to specify that any particular body of persons were possible purchasers, though the judgment of Lord Alverstone L.C.J. seems quite consistent with the view that the potentiality must be valued, even if the acquiring authority be its only possible purchaser. But it is contended that Sir Richard Henn Collins M.R. expressed the contrary view. After referring to the particular adaptability of the land that was in question and that it ought to find a place in the estimate of the amount of compensation, he said (2): "That view is supported by "authority and long practice; but underlying it is the question, "which is one of fact for the arbitrator, whether there is a "possible market for the site, and in determining that the "statutory purchase is not to be considered."

But the Master of the Rolls said that the purchase, not the purchaser, was to be left out of consideration. Any enhanced value attaching to the land by reason of the fact that it has been compulsorily acquired for the purpose of the acquiring authority must always be disregarded, and the Master of the Rolls meant no more than that. The case of *Lucas and Chesterfield Gas and Water Board* (3), must, however, be considered in greater detail, for it is on certain

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(1) [1904] 1 K. B. 417.
(2) Ibid. 423.
(3) [1909] 1 K. B. 16.

J. C.
1939
VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

dicta of Fletcher Moulton L.J. in that case that the respondent chiefly relies. The land that had been compulsorily acquired in that case had potentialities for which the acquiring authority was not the only possible purchaser. The point now being considered did not therefore arise for decision. But in the Court below (1), Bray J. had said this : "I come back to the question whether the fact that no "buyer for reservoir purposes can be found, except a buyer "who has obtained parliamentary powers, prevents the "special value of the land being marketable. In my opinion "the answer I ought to give to that question is 'No'."

In the Court of Appeal (2), Vaughan Williams L.J. said: "I agree with Bray J. that the fact that no buyer for reservoir "purposes can be found except a buyer who has obtained "parliamentary powers does not prevent the special value "being marketable," and stated that one of his reasons for so agreeing was that the fact that the board (who were the acquiring authority) might themselves become possible purchasers who would give a special price for the land, ought to be considered. Fletcher Moulton L.J., however, said that the decided cases to his mind laid down the principle that, when the special value exists only for the particular purchaser who has obtained powers of compulsory purchase, it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the land to be purchased under it. He added that where there were other possible purchasers there would be competition among them and this fact would enhance the market price. The learned Lord Justice did not specify the authorities which laid down the principle in question and their Lordships are not aware of any that would justify it. It must, of course, be conceded that the existence of the scheme must not be allowed to enhance the price, if by "scheme" is meant the fact that compulsory powers of acquisition have been obtained for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality. The valuation must

(1) [1908] 1 K. B. 571, 579.

(2) [1909] 1 K. B. 16, 25.

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

always be made as though no such powers had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers. But their Lordships have some difficulty in seeing why the taking into consideration of the fact that the special value exists for those purchasers only should be said to be allowing the existence of the scheme to enhance the value of the lands. The only difference that the scheme has made is that the acquiring authority, who before the scheme were possible purchasers only, have become purchasers who are under a pressing need to acquire the land; and that is a circumstance that is never allowed to enhance the value. If, on the other hand, the Lord Justice meant by " the scheme " the intention formed by the acquiring authority of exploiting the potentiality of the land, his statement can only mean that the value of the land is not to be enhanced by the fact that they are possible purchasers. The result of this would be that, even in a case where there are two or more possible purchasers, their existence must not be allowed to enhance the value. For each purchaser must be deemed to have a scheme in the sense supposed, and the enhancement of value due to their competition which the Lord Justice envisages will in fact be due to the " schemes." In these circumstances their Lordships are not prepared to follow the dictum of Fletcher Moulton L.J. in the *Lucas* case (1), and prefer the opinion there expressed by Vaughan Williams L.J. It is said, however, that the dictum of Fletcher Moulton L.J. has already received the approval of this Board on more than one occasion. But in no case to which their Lordships' attention has been called was the question of the effect of there being only one possible purchaser of the land being considered by the Board, and any approval of the statement of the law by the Lord Justice must be regarded merely as an approval of such statement so far as it affected the particular question then before the Board. It is sufficient in this connection to refer to two of such cases. In *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (2), Lord

(1) [1909] 1 K. B. 16. (2) [1914] A. C. 569, 576.

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

Dunedin, in delivering the judgment of the Board, said this: "The law of Canada as regards the principles upon which "compensation for land taken is to be awarded is the same as "the law of England and it has been explained in numerous "cases, nowhere with greater precision than in the case of "*In re Lucas and Chesterfield Gas and Water Board* (1), where "Vaughan Williams and Fletcher Moulton L.JJ. deal with "the whole subject exhaustively and accurately."

As has already been pointed out, the opinions of the two Lords Justices upon the question now being considered were diametrically opposed to one another. The other case is that of *Fraser* v. *City of Fraserville* (2), where Lord Buckmaster, in delivering the judgment of the Board, said: "The "principles which regulate the fixing of compensation of "lands compulsorily acquired have been the subject of many "decisions, and among the most recent are those of *In re* "*Lucas and Chesterfield Gas and Water Board* (1), *Cedars Rapids* "*Manufacturing and Power Co.* v. *Lacoste* (3), and *Sidney* v. "*North Eastern Railway Co.* (4). The principles of those cases "are carefully and correctly considered in the judgments "the subject of appeal, and the substance of them is this: "that the value to be ascertained is the value to the seller "of the property in its actual condition at the time of "expropriation with all its existing advantages and with all "its possibilities, excluding any advantage due to the carrying "out of the scheme for which the property is compulsorily "acquired, the question of what is the scheme being a "question of fact for the arbitrator in each case."

It will be observed that Lord Buckmaster makes no reference whatsoever to the present question. But in one of the cases to which the noble and learned Lord referred—namely, *Sidney* v. *North Eastern Ry. Co.* (4), Rowlatt J. is thought to have said much the same as had been said by Fletcher Moulton L.J. In that case certain land possessed the potentiality of being used for the purposes of a railway. That potentiality was capable of being turned to account by

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(1) [1909] 1 K. B. 16.
(2) [1917] A. C. 187, 194.
(3) [1914] A. C. 569, 576.
(4) [1914] 3 K. B. 629.

J. C.
1939
VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

a railway company who had obtained compulsory powers of acquiring it and by the proprietor of an adjoining colliery. In assessing the compensation to be paid by the railway company for the land, the arbitrator took into account the possibility that, but for its acquisition by the railway company, the colliery proprietor might have purchased it, but he did not take into consideration the possibility that the company might in friendly negotiation have been willing to pay more for it than the colliery proprietor. In their Lordships' opinion he was wrong in this. The Divisional Court, however, on a case stated, upheld the decision of the arbitrator. In the course of his judgment Rowlatt J. said this: "Now if and so long as there are several competitors "including the actual taker who may be regarded as possibly "in the market for purposes such as those of the scheme, the "possibility of their offering for the land is an element of the "value in no respect differing from that afforded by the "possibility of offers for it for other purposes. As such it "is admissible as truly market value to the owner and not "merely value to the taker. But when the price is reached "at which all other competition must be taken to fail to "what can any further value be attributed? The point has "been reached when the owner is offered more than the land "is worth to him for his own purposes and all that any one "else would offer him except one person, the promoter, who is "now, though he was not before, freed from competition. "Apart from compulsory powers, the owner need not sell "to that one and that one would need to make higher and "yet higher offers. In respect of what would he make them? "There can only be one answer—in respect of the value to "him for his scheme. And he is only driven to make such "offers because of the unwillingness of the owner to sell without "obtaining for himself a share in that value. Nothing "representing this can be allowed."

If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor, and not the price that would be paid by a "driven" purchaser to an unwilling vendor, their Lordships

J. C.
1939
Vyricherla Narayana Gajapatiraju
v.
The Revenue Divisional Officer, Vizagapatam.

agree. But so far as it means that the possibility of the promoter as a willing purchaser being willing to pay more than other competitors, or in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality is to be disregarded, their Lordships venture respectfully to differ from the learned judge.

For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers and that he is no more confined to awarding the land's "poramboke" value in the former case than he is in the latter.

It is now necessary to take up once more the narrative of the events that have led up to this appeal.

On January 5, 1929, the appellant filed his claim for compensation. It was certainly not lacking in courage but it was lacking strangely enough in any suggestion that the land had a potential value as a source from which water might be supplied to persons or corporations outside Lova Gardens. He did, however, allege that Lova Gardens had a valuable potentiality as a building site and that such potentiality would be destroyed if he were deprived of the spring. He accordingly claimed Rs.2,50,000 in this respect, calling it "Damages sustained by severance," though in strictness it should have been called damages sustained by reason of the acquisition injuriously affecting his other property. He also claimed Rs.1200 per acre in respect of the land and Rs.16,050 as the value of the masonry structures, roads, and trees on the land, the total claim amounting to Rs.3,96,730.

On January 18, 1929, the Land Acquisition Officer made his award. He allowed in all a sum of Rs.17,745-1-3 including the 15 per cent. addition prescribed by s. 23, sub-s. 2, of the Act. It appears from the grounds of award bearing the same date that he thought nothing of the potentiality of Lova Gardens as a building site, and the existence of any such potentiality has now disappeared from the case and need not be referred to again. He valued the land at Rs.50 an acre with the exception of the land numbered 2–3B, which he valued at Rs.300 an acre. As to the claim in respect of " Damages sustained by severance," he thought that the rest of the appellant's land was probably better off without the water from the spring than with it. The lower part of the gardens, which was marshy and malarious, had too much water as it was. In any case he considered that the appellant would be amply compensated for the loss of the spring water by the Rs.5000 that he awarded under this head. The appellant's claim of Rs.2,50,000 was, he said, preposterous. He also awarded a sum of Rs.4493 in respect of trees and buildings. The appellant thereupon required that the matter should be referred to the Court for determination under s. 18 of the Act and in due course it came on for hearing before the Subordinate Judge of Vizagapatam. It was then claimed on the appellant's behalf that the spring could, but for its acquisition, have been used by him as a source of water supply either to the Harbour Authority or to the oil companies and others residing or carrying on business in the harbour area; and the appellant claimed to be compensated upon this footing. After a lengthy hearing before him in the course of which many questions of law and fact not now in issue were discussed, the learned judge made his award. He found as a fact, and the fact cannot be disputed, that the water of the spring was on February 13, 1928, capable of being used as a source of water supply to persons outside the plaintiff's land. He also found that the only possible buyers of the water at that date were the Harbour Authority itself and the oil companies and labour camps that might be established as a result of the development of the harbour and stated that this fact would be taken into consideration in fixing the amount of compensation. But, after considering the

J. C.
1939
VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

authorities on the subject, he came to the conclusion as a matter of law that the value to a vendor of a potentiality of his land can be assessed even though there are no other possible purchasers beyond the acquiring authority. Other principles of law stated by him for his guidance in making his award were that it was the contingent possibility of the user that had to be taken as the basis of valuation and not the realized possibility, and that the use to which the acquiring authority had actually put the property could be taken as a strong piece of evidence to show that the property acquired could be put to such use by the owner at the date of acquisition. Applying these principles, he found that the value of the land acquired, including the spring, was Rs.1,05,000, which, with the addition of the 15 per cent. under s. 23, sub-s. 2, of the Act, amounted to Rs.1,20,750. The Rs.17,745–1–3 awarded by the Land Acquisition Officer had been paid to the appellant and received by him under protest, and deducting this sum from the Rs.1,20,750, there remained Rs.1,03,004–14–9 due to the appellant. This sum he decreed in favour of the appellant with certain interest. The valuation of Rs.1,05,000 was arrived at in this way. Evidence had been given before the learned judge by two witnesses on behalf of the appellant as to what would be a proper charge for water supplied to the harbour area from the spring, and they estimated the charge at Re.1–8–0 per 1000 gallons. The learned judge, however, said that taking into consideration the conclusions arrived at by him, which were presumably the conclusions of law and findings of fact referred to above, he thought it would be reasonable and proper to fix the value of the acquired property, i.e., the water source on the date of the acquisition on the basis of Re.1 per 1000 gallons. Taking the normal supply of water at 50,000 gallons a day, this gave as the gross annual value of the water the sum of Rs.18,250. He estimated that maintenance charges, depreciation of machinery, and interest on the capital outlay, would come to Rs.12,273 ; but taking these items at the round figure of Rs.13,000, the net annual income from the spring would be Rs.5250. This he capitalized at twenty years' purchase and so arrived at the Rs.1,05,000.

J. C.
1939
Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam.

Having regard, amongst other things, to the extravagant claims put forward by the appellant in the first instance he awarded him no costs.

From this decision an appeal was taken by the present respondent to the High Court at Madras, the appellant lodging a memorandum of cross-objections to the valuation of the Subordinate Judge which need not be specified. The appeal was heard by Wadsworth and Stodart JJ. and judgment allowing the appeal was delivered on May 4, 1937. The reasons for this decision given by Wadsworth J., in whose judgment Stodart J. concurred, may be summarized as follows :—

The scheme for utilization of the water and the carrying-out of anti-malarial operations in the valley (i.e., the Lova Gardens) was not really an independent scheme. It was linked up with a bigger scheme for getting rid of breeding places of mosquitoes all round the southern side of the harbour so as to make the whole of that area fit for development. At the time when this scheme was promulgated the whole of that area was undeveloped. It was full of malaria and was incapable of any profitable use apart from the success of the anti-malarial campaign of which this acquisition was part. It was not conceivable that the present appellant himself would ever have been able to develop a water supply scheme, carrying out the necessary anti-malarial works and thereby encouraging business concerns to occupy the harbour land and buy water from him. The conclusion, therefore, must be that the special adaptability of the land for the supply of drinking water had no value apart from the scheme for which the acquisition was made.

The Harbour Authority, therefore, was at the date of the notification the only reasonably possible purchaser for the drinking water supply on the appellant's land and this being so the Subordinate Judge had erred in awarding compensation for the special adaptability of the land to supply drinking water to persons outside the appellant's land. After referring to the authorities and in particular the dictum of Fletcher Moulton L.J. in the *Lucas* case (1), he said : " There

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(1) [1909] 1 K. B. 16.

J. C.
1939
Vyricherla Narayana Gajapatiraju v. The Revenue Divisional Officer, Vizagapatam.

"can be little doubt that this exposition of the law when "applied to the facts of the present case as we have found "them would justify the conclusion that no value can be "awarded to the special adaptability of this land for supplying "drinking water to the harbour alone, if it can be shown that "the land cannot have any value as a source of drinking "water to anyone else."

By the harbour the learned judge meant, of course, the Harbour Authority. Stodart J., who, as already stated, concurred in the judgment of Wadsworth J., added that: "It is not contended that any other public authority or "private undertaker except the Harbour Authority would "ever have come forward to develop this area and make "it habitable. Thus the value of the . . . . spring as a "source of drinking water . . . . arose entirely from "the Anti-Malarial Scheme carried out by the Harbour "Authority and depended on the success of that scheme. "To my mind section 24, sub-section 5, of the Land "Acquisition Act is completely applicable to the facts of "this case."

The appeal was accordingly allowed with costs there and below and the award of the Land Acquisition officer was restored in toto. The memorandum of cross-objections was dismissed with costs. From that judgment, the necessary leave having been obtained, the appellant now appeals to His Majesty in Council.

Their Lordships agree with the High Court that on February 13, 1928, the only really possible purchasers of the special adaptability of the appellant's land as a water supply was the Harbour Authority. The position at that time was that the harbour was so far advanced that its opening in a few years was in contemplation. It was expected that, when that had taken place, oil companies and other industrial concerns, with their attendant labour camps, would be attracted to the harbour area, and they would all require to be supplied with water. It is plain that neither the appellant nor any purchaser from him would encounter any engineering difficulties in conducting the water from

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

the spring to the southern boundary of the harbour area. Nor would they encounter any engineering difficulty in conducting the water from that boundary to the premises of the oil companies and other concerns. They would, however, have had to obtain the consent of the Harbour Authority to lay the necessary pipes in the harbour area itself and the possibility of such consent being refused would have to be taken into consideration in estimating the value to the appellant of the special adaptability of his land, though the risk of such consent being refused was not a serious one, assuming that there was no other source from which the water could be profitably supplied by the Harbour Authority itself. There was, however, on February 13, 1928, a much more serious matter to be taken into consideration. As already pointed out, the harbour area was at that date a highly malarious place, little calculated to prove attractive as a site for any industrial concern. Unless, therefore, this state of affairs was remedied, there would be no customers for the appellant's water and the value to him of the special adaptability was nil. Now it is true that there was a practical certainty of the Harbour Authority taking steps to render the site as free as possible from malaria; for, if they did not, the harbour would not be used to any great extent even as a port of call. But, in order to carry out the necessary anti-malarial works, it was essential for the Harbour Authority to obtain a supply of drinking water from some source other than the wells in the area which were largely responsible for the malarious condition of the area and were going to be closed. The appellant on February 13, 1928, would therefore have been in this dilemma. If the only other source of water were the appellant's spring, the Harbour Authority would be the only possible purchaser. If, on the other hand, the Authority could obtain water from other sources sufficient both for the anti-malarial work and the supply of the traders in the harbour area, the appellant would almost certainly be refused permission to carry his competing supply over the Authority's land. In point of fact there was at one time an alternative scheme on foot for obtaining water known as the Meghadrigedda Scheme. The scheme was to be for the benefit of the Municipality of Vizagapatam, the Bengal Nagpur Railway and the harbour. The scheme aimed at a supply of one million gallons a day of which the harbour was to have 150,000 gallons a day. The scheme has not been proceeded with, but it is impossible to say what would have been done about it had the spring in the Lova Gardens not been acquired. In these circumstances the possibility of the appellant's water being made available for the harbour by anyone other than the Harbour Authority was altogether negligible, and the only enhancement in the value to the appellant of his land by reason of its special adaptability as a water supply was the sum that the Harbour Authority, as a willing purchaser, would have been willing to give in excess of the land's "poramboke" value.

Their Lordships have given their reasons for thinking, contrary to the view taken by the High Court, that such sum must be taken into consideration in fixing the compensation payable to the appellant, and that such sum is not to be treated as being a negligible one merely because the Harbour Authority was the only possible purchaser.

It remains to deal with s. 24, sub-s. 5, of the Land Acquisition Act. That sub-section as applied to the present case means no more than this: that in valuing the appellant's land on February 13, 1928, it must be valued as it then stood, and not as it would stand when the land had been acquired and the water on it used for ridding the harbour area of malaria. The Harbour Authority would otherwise be made to pay for the water twice over. But the sub-section does not mean that the possibility that a particular purchaser of land will give a higher price for it by reason of its possessing a special adaptability must be disregarded merely because the land will be more valuable in his hands when he exploits that adaptability than it would be if left in the hands of the vendor who was unable to exploit it. In *Clay's* case (1), for instance, the house after being added to the nurses' home was no doubt

(1) [1914] 1 K. B. 339.

more valuable than it was before. That, indeed, was the reason why the trustees of the home paid 250*l.* more than any other purchaser would have paid. The house in that case was held to be of the value of 1000*l.*, not because that was its value after being put to the use for which it was acquired, but because that was the price which the willing purchaser was prepared to pay for its acquisition. In the present case the land must be valued not at the sum it would be worth after it had been acquired by the Harbour Authority and used for anti-malarial purposes, but at the sum that the Authority " in a friendly negotiation "(to use Lord Johnston's words) would be willing to pay on February 13, 1928, in order to acquire it for those purposes.

Returning to the award made in the present case by the learned Subordinate Judge, it is to be observed that, in valuing the land with its special adaptability as being worth Rs.1,05,000 to the appellant, he did so on the footing that the appellant would himself have been in a position to supply the water to the harbour but for its compulsory acquisition by the Harbour Authority. He would also seem to have so valued it upon the footing that the spring could have been made an income-earning concern on February 13, 1928. He would otherwise have made a substantial discount from the Rs.1,05,000. It is plain, therefore, that, in view of the fact that the water could not be exploited by the appellant himself and that it would necessarily be some years before the water would become a profit-earning asset in their hands, the Harbour Authority, however willing purchasers they might be, would not have agreed to pay anything like that sum. In these circumstances the matter should in strictness be referred back to the Subordinate Judge to revise his award. Both the parties to this appeal, however, have asked their Lordships, with a view to saving expense, to state what should be the proper amount of the award, and this their Lordships have consented to do. Giving the matter the best consideration they can, their Lordships are of opinion that the total price which the Harbour Authority would have been willing to pay on February 13, 1928, for the land

J. C.
1939

VYRICHERLA NARAYANA GAJAPATIRAJU
v.
THE REVENUE DIVISIONAL OFFICER, VIZAGAPATAM.

acquired, is the sum of Rs.40,000, and this sum with the additional 15 per cent. amounts to Rs.46,000. In their Lordships' judgment the order of the High Court of May 4, 1937, should be discharged except in so far as it dismissed the present appellant's memorandum of objections with costs. The amount decreed by the Subordinate Judge in favour of the appellant should be reduced from Rs.1,03,004–14–9 to Rs.28,254–14–9 with interest as stated in his award. His order as to costs must stand. But the respondent must pay the appellant's costs before the High Court and his costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant : *T. L. Wilson & Co.*
Solicitor for the respondent : *The Solicitor, India Office.*

[HOUSE OF LORDS.]

H. L. (E.)* PHILIPPSON AND OTHERS . . . . APPELLANTS;

1939

March 2.

AND

IMPERIAL AIRWAYS, LIMITED . . . RESPONDENTS.

Carrier—Air carriage—Convention of Warsaw—"International carriage"—"High Contracting Parties"—Carriage by Air Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 36), *s.* 1, *sub-s.* 2; *Sch.* 1.

The appellants handed to the respondents a consignment of gold for carriage from Croydon airport to Haren airport in Belgium under the terms of an air consignment note comprising the contract for carriage. On the night of March 5, 1935, the box and its contents were stolen at Croydon airport, and in this action the appellants claimed to recover the value of the gold, 10,600*l.* The action was commenced more than six months, but less than two years, after the loss. The air consignment note was issued by the respondents and was expressed to be in the form of the International Air Traffic Association. The note was signed by the appellants. On the back of the note were certain general conditions, the first of which was: "The "general conditions of the carriage of goods are applicable to "both internal and international carriage." The general conditions were based upon the Convention of Warsaw, dated October 29, 1929, in so far as concerned international carriage within the special meaning of the Convention. The Convention was entered into by the representatives of some thirty States for the unification of certain rules relating to international carriage by air, and came into force on February 13, 1933.

On February 13, 1933, Great Britain, having signed the convention, ratified it, but, though Belgium had also signed it, she had not ratified it at the time of the loss of the gold, and did not do so until October 11, 1936.

The air consignment note provided that any action for loss or damage by carriage must be brought within two years of the loss or damage unless the contract was not within the category of "international carriage," in which case the action must be brought within six months. The question therefore was whether the carriage of the goods fell within the special categories of international carriage defined in art. 1, para. 2, of the general

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

Reported by Geoffrey P. Langworthy, Esq., Barrister-at-Law.

H. L. (E.)

1939

PHILIPPSON
v.
IMPERIAL
AIRWAYS, LD.

conditions. International carriage, as so defined, was carriage between two places within the territory of two High Contracting Parties to the Convention of Warsaw.

The respondents alleged that until Belgium ratified the Convention she was not a High Contracting Party, and that therefore the carriage between great Britain and Belgium in March, 1935, was not international carriage, and consequently any action for damages must have been brought within six months of the loss.

Porter J. and the Court of Appeal held that the carriage was not international.

Held (Lord Russell of Killowen and Lord Macmillan dissenting), that, on the terms of the general conditions, the carriage in this case fell within the special categories of international carriage there defined, as the conditions were expressed to be based upon the Convention of Warsaw and the definition in art. 1, para. 2, sub-para. 2, of the general conditions practically repeated verbatim the language of art. 1, para. 2, of the Convention. The correct course to ascertain what the contract between the parties meant by High Contracting Parties to the Convention was to look at the Convention itself, and under its terms, particularly arts. 36, 37, 38, 39 and 40, High Contracting Parties meant signatories. For the purposes of the contractual general conditions, the Carriage by Air Act, 1932, passed by this country to give effect to the Convention had no operation at all.

Reasoning in *Grein* v. *Imperial Airways, Ld.* [1937] 1 K. B. 50 not agreed with.

Lord Russell of Killowen and Lord Macmillan were of opinion that the only question was whether Belgium on March 5, 1935, was a High Contracting Party to the Warsaw Convention within the meaning of the contract, and that it was wholly irrelevant to inquire whether Belgium was or was not at that date a High Contracting Party within the meaning of the Convention. The contract had no ambiguity, it meant parties which were contractually bound by the Convention, i.e., Powers which had signed and ratified and Powers which had acceded.

Decision of the Court of Appeal (March 3, 1938) reversed.

The appellants are a firm carrying on business as bankers in Brussels, and the respondents operate a service of carriage by air from (inter alia) London to Brussels. On March 5, 1935, the appellants, through their agents Machinery and Technical Transport, Ld., delivered to the respondents in London a box containing 5000 gold sovereigns and 5000 United States gold coins known as " Eagles " and " Dougle Eagles " (hereinafter referred to as " the gold ") for carriage by air to Brussels. The gold was taken to Croydon Aerodrome by the respondents and was lodged by them in a strong room for the night of March 5–6, it being intended that the gold should be carried to Belgium on the morning of March 6. During the night the gold was stolen from the strong room and has never been recovered. The value of the gold was at the material time 10,600*l.*

The appellants commenced an action against the respondents claiming damages for the loss of the gold. After the close of the pleadings the following were set down to be tried as preliminary questions of law:—

I. (*a*) Whether the contract of carriage under and contained in the consignment note referred to in the pleadings was subject to the Carriage by Air Act, 1932 (hereinafter referred to as " the Act ") ?

(*b*) If so, whether the said consignment note satisfied the requirements of art. 8 (*q*) of the Convention set out in the First Schedule of the Act ?

(*c*) If the answer to question (*a*) is in the affirmative and the answer to question (*b*) is in the negative, whether the defendants have any defence to the plaintiffs' claim ?

II. (*a*) Whether the carriage covered by the said consignment note was " international carriage " as defined by art. 1, para. 2, of the General Conditions of Carriage of Goods referred to in the pleadings and hereinafter referred to as " the conditions " ?

(*b*) If so, whether the said consignment note satisfied the requirements of art. 4, para. 4, sub-para. 5 (*b*), of the conditions ?

(*c*) If the answer to question (*a*) is in the affirmative and the answer to question (*b*) is in the negative, whether the defendants have any defence to the plaintiffs' claim ?

III. Whether the plaintiffs' claim is barred under the conditions by reason of the action not having been commenced within six months of the loss ?

IV. Whether there was (*a*) within the meaning of art. 22, para. 2, of the Convention set out in the First Schedule to the Act, or (*b*) within the meaning of art. 20, para. 2, sub-para. 1, of the conditions a special declaration of value and supplementary payment made as alleged in para. 1 of the points of claim, and, if so, what is the effect thereof in law?

V. On the answers to the foregoing questions, what measure of damage, if any, is applicable?

1939. Jan. 19, 20, 22 and 24. *Sir Robert Aske K.C.* and *W. L. McNair* for the appellants.

Sir Robert Aske K.C. By the conditions of the contract every consignment note is to contain the special statements set out in art. 4. The question is whether the words set out on the back of the consignment note in the present case conform to that term.

[LORD WRIGHT. The first thing to decide is whether this was "international carriage."]

The net result of the material articles is that the plaintiffs had two years in which to bring their action if it was international carriage. It is material that that provision was inserted for the protection of the carrier, and, unless it is made clear that it applies, it affords no protection.

The appellants do not contend that the Air Navigation Act, 1936, applies. They rely on the plea that this was international carriage and that the consignment note did not comply with art. 4.

A party to a consignment note, looking at the Convention of Warsaw, would come to the conclusion that the High Contracting Parties meant parties who had signed or acceded to the Convention.

The appellants' claim is based on the true construction of the consignment note, which incorporates the general conditions of carriage (hereinafter referred to as "the conditions"). The articles of the conditions on which the respondents rely to defeat the appellants' claim are (1.) that which provides that in case of carriage which is not international suit must be brought within six months; and (2.) that which provides that damages are limited to 250 francs per kilogram if no special declaration of value has been made to the carrier. The latter article cannot be relied on by the respondents if the appellants are right in their contention that the carriage was international and that the consignment note did not contain a statement that the carriage was subject to the rules relating to liability set out in the Convention of Warsaw. It follows that the main question in this appeal is whether or not the carriage from London to Brussels was in March, 1935, international carriage within the meaning of the contract.

W. L. McNair followed. The Court of Appeal were wrong in holding that this was not international carriage. This question depends upon the construction of art. 1, para. 2, sub-para. 2, of the conditions by which :—

" The special categories of ' international carriage ' referred "to in sub-para. 1 of this paragraph include all carriage by "air in which according to the contract made by the parties, "the place of departure and the place of destination . . . . "are situated either within the territories of two High Con- "tracting Parties to the Convention of Warsaw for the unifica- "tion of certain rules relating to International Air Transport "of October 12, 1929, upon which these conditions are based, "or within the territory of a Single Contracting Party if there "is an agreed stopping place within a territory subject to "the sovereignty, suzerainty, mandate or authority of "another Power, even though that Power is a non-contracting "Power."

The Kingdom of Belgium in March, 1935, had not either ratified or acceded to the Convention of Warsaw, but it was then nevertheless a " High Contracting Party " within the meaning of art. 1, para. 2, sub-para. 2. On the true construction of that sub-paragraph the words " High Contracting Parties "to the Convention of Warsaw," considered as words of contract, have the same meaning as in the Convention and there clearly mean those States who by their plenipotentiaries have signed the Convention. This is the only meaning that can be given to the phrase in art. 37, para. 2, and art. 40, para. 1, of the Convention and in the Additional Protocol to the Convention. The three judges of the Court of Appeal were wrong in holding that the words " High Contracting "Parties to the Convention of Warsaw " meant those States only who had ratified or acceded to the Convention. Porter J.

took the view that the appellants were right on this question, and it is submitted that this view is correct.

Porter J. nevertheless held that, as the term High Contracting Parties appeared in a document which formed part of a contract made in England, it must be construed according to the provisions of the Carriage by Air Act, 1932. That Act provides that the Convention is only to be applied as regards those States who had been certified by Order in Council made under the Act to be High Contracting Parties to the Convention. Belgium had not at the material time been so certified and therefore in his opinion the carriage was not "international carriage." Greer L.J. in the Court of Appeal agreed with this view, but Slesser L.J. and Clauson L.J. dissented from it.

The view of Greer L.J. and of Porter J., it is submitted, is wrong because (1.) the Carriage by Air Act, 1932, ex concessis does not apply to the carriage and does not purport to lay down any definitions of general application, and (2.) s. 1, sub-s. 2 of the Act only gives power to his Majesty by Order in Council to certify who are the High Contracting Parties to the Convention, and does not provide that any State not so certified is not a High Contracting Party to the Convention.

The meaning of the term High Contracting Parties contended for by the appellants is in accordance with International Law. See the judgment of Lord Atkin in *Attorney-General for Canada* v. *Attorney-General for Ontario* (1); Oppenheim's International Law, ed. 5, vol. i., pp. 711–713.

Accordingly, the carriage in this case was international carriage within the meaning of the contract, and the appellants' claim is not barred by reason of the action not having been commenced within six months of the loss.

In any case, it is clear that the term is used in the Convention in several places as meaning Powers who have signed but who have not ratified. It follows that art. 2 of the conditions is at least ambiguous, and leaves the consignor of goods in doubt as to whether or not the carrier is entitled to rely on parts of the conditions which are only applicable to non-international carriage. The articles here relied on are in reality exceptions clauses. An ambiguous exceptions clause is no protection: see *Elderslie* v. *Borthwick* (1) and *Nelson Line* v. *Nelson & Sons, Ld.* (2) The contract must be read as it would be read by a business man who was consigning his goods to the carrier for carriage. The intention of framers of the conditions is irrelevant in construing this contract of carriage.

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(1) [1937] A. C. 342–345.

If the carriage was "international carriage," then the question arises whether the respondents can rely on the articles in the conditions which limit their liability. By art. 4, para. 4, sub-para. 5 (*b*), of the conditions the air consignment note should contain a statement that the carriage is subject to the rules relating to liability set out in the Convention of Warsaw of October 12, 1929, upon which the conditions are based. The consignment note in this case did not contain any such statement. The words that the consignment note did contain were: "Carriage by Air: The "General Conditions of Carriage of Goods are applicable to "both internal and international carriage. These General "Conditions are based upon the Convention of Warsaw of "October 12, 1929, in so far as concerns international carriage "within the special meaning of the said Convention." This statement in the consignment note is not a statement that the carriage was subject to the rules relating to liability set out in the Convention of Warsaw. Accordingly by art. 7, para. 3, of the conditions the respondents are not entitled to avail themselves "of those provisions of art. 20, "para. 1, sub-paras. 1 and 3 and para. 2, sub-para. 1 which exclude or limit their liability." Lewis J. so held in *Westminster Bank, Ld.* v. *Imperial Airways* (3) in considering the parallel provisions in the Schedule to the Carriage by Air Act, 1932, and it is submitted his decision was right.

The clauses on the back of the consignment note which purport to limit the liability of the carrier in certain cases cannot be relied on by the respondents, as they have no

(1) [1905] A. C. 93.

(2) [1908] A. C. 16.

(3) (1936) 52 Times L. R. 607; 155 L. T. 86; 55 Ll. L. Rep. 242.

contractual force and are only intended to be a resumé of certain of the articles of the conditions.

A. T. Miller K.C. and *H. G. Robertson* for the respondents. The fundamental question is, was this carriage "international"? To be so, we submit that the carriage must be between two countries each of which has adopted the Convention by ratifying it. Belgium not having ratified it is therefore not a "High Contracting Party" and consequently the limitation period is not two years but six months. In the document under construction there is a clear, unambiguous statement of the liability which is intended to be contractual. The opening sentences of the judgment of Greene L.J. in *Grein* v. *Imperial Airways, Ld.* (1) accurately summarize the object of the Convention as stating the rules to be applied by the Courts of the High Contracting Parties. To succeed, the appellants must point to a contract which each of the High Contracting Parties has adopted as part of its laws, and this they have failed to show.

Sir Robert Aske K.C. replied.

The House took time for consideration.

Mar. 2. LORD ATKIN (read by LORD THANKERTON). This is an appeal from an order of the Court of Appeal affirming an order of Porter J. answering questions put as preliminary points of law in an action by the present appellants against the respondents for the loss of a parcel of gold consigned by the plaintiffs for carriage by the defendants by air from London to Brussels. The action proceeded till the pleadings were closed and thereupon application was made that apparently every issue that was in controversy between the parties should be tried as a preliminary point of law. What advantage the parties gained over the trial of the action in due course it is difficult to see, unless indeed they sought to gain some priority over other litigants. However, the questions were formulated and ordered to be tried and this appeal ensues.

The questions arise solely on the terms of the contract of carriage between the parties, which is contained in an air consignment note dated March 5, 1935. It is in English and French and is expressed to be the form of the International Air Traffic Association and is issued by Imperial Airways, Ld., who express themselves to be members of the International Air Traffic Association. The goods to be carried are one box of sovereigns and gold dollars of a market value of 10,600*l.*, to be carried from Croydon to Haren airport in Belgium for a freight of 1 per mil., i.e., 10*l.* 12*s.* The document is signed by the consignor under the following clause:— "The consignor hereby expressly declares that the above "particulars furnished by him or his agent are correct and "that he is aware of and accepts the general conditions of "carriage more particularly referred to on the back of this "document." In my opinion this is a written contract signed by the consignor and the whole of the contractual terms are to be found on the face of the document. On the back, under the heading "Conditions of Carriage," are to be found three paragraphs, the first of which is "Carriage by Air. The general "conditions of carriage of goods are applicable to both internal "and international carriage." These general conditions are based upon the Convention of Warsaw of October 12, 1929, in so far as concerns international carriage within the special meaning of the said convention. A further paragraph deals with combined transport, i.e., air-rail transport; and a further paragraph is headed "Liability." This begins by saying that in all cases the liability of the air-carrier is limited to a maximum of 250 French francs per kilogram: and states an exception for loss by negligent navigation or on proof that all necessary measures have been taken to avoid damage. This paragraph in my view merely summarizes the stipulations in the general conditions which have been defined in the first paragraph, though the summary omits the detailed qualifications. There is nothing in these paragraphs which in any way modifies the general conditions: and whether they seek to modify them or not they would not in any case form part of the written contractual terms. There follows a statement in English only that the Imperial Airways are not common carriers and that there is not implied in the contract of carriage any warranty of fitness for carriage. I do not think that these words at the back are incorporated into the contract of carriage.

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(1) [1937] 1 K. B. 50, 74.

The contractual terms then as to liability must be found in "the general conditions of carriage more particularly "referred to on the back": and it is common ground that what are incorporated into the contract are the general conditions of carriage of passengers and baggage which have been agreed between the members of the International Air Traffic Association and are to be found, together with the appropriate forms, in an orange book issued by the Association from the Hague. For the purposes of this judgment the following articles are relevant. Art. 1, paras. 1 and 2, sub-paras. 1 and 2; art. 4, para. 4, sub-para. 5 (*b*); art. 7, para. 3; art. 19, paras. 2 and 4; art. 20, para. 1, sub-paras. 3 and 4, and para. 2; art. 23, para. 1, sub-paras. 1 and 2, and para. 2. These articles are as follows:—

"GENERAL CONDITIONS OF CARRIAGE OF GOODS.
"SCOPE—DEFINITIONS.

"*Art.* 1: *Transport undertakings and consignments to which "these Conditions are applicable.*

"Para. 1: These conditions are applicable to all carriage "(internal and international) of goods performed by an air "transport undertaking (carrier) which is a member of the "International Air Traffic Association. Nevertheless the "special provisions referred to in para. 2, sub-para. 1, of this "article are only applicable to the special categories of "international carriage defined in para. 2, sub-para. 2, of this "article.

"Para. 2: (1.) The provisions of art. 4, para. 4, sub-para. 5; "art. 7, para. 3 (second sentence); art. 8, para. 4, sub-para. 4; "art. 13, para. 4, sub-para. 1 (third sentence); art. 20, para. 1, "sub-para. 2; art. 22, para. 4, sub-para. 2; and art. 23, "para. 1, sub-para. 1, are applicable only to the special "categories of international carriage defined in sub-para. 2 "of this paragraph.

"(2.) The special categories of international carriage referred "to in sub-para. 1 of this paragraph include all carriage by "air in which, according to the contract made by the parties, "the place of departure and the place of destination, whether "or not there be a break in the carriage or a trans-shipment, "are situated either within the territories of two High "Contracting Parties to the Convention of Warsaw for the "unification of certain rules relating to International Air "Transport of the 12th October 1929 upon which these "conditions are based, or within the territory of a Single "Contracting Party if there is an agreed stopping place "within a territory subject to the sovereignty, suzerainty, "mandate or authority of another Power, even though that "Power is a non-contracting Power.

"*Art.* 4: *Scope and form of the Air Consignment Note.*

"Para. 4: (5.) So far as concerns international carriage, "as defined by art. 1, para. 2, the air consignment note shall "contain in addition the following particulars inserted by the "carrier :—

"(*b*) a statement that the carriage is subject to the rules "relating to liability set out in the Convention of Warsaw of "12th October 1929 upon which these Conditions are based.

"*Art.* 7: *Conclusion of the contract of carriage.*

"Para. 3: The absence, irregularity or loss of the air "consignment note does not affect the existence or validity "of the contract of carriage, which shall none the less be "subject to these conditions. If the carrier accepts goods for "international carriage, as defined by art. 1, para. 2, without "an air consignment note having been made out, or if the "consignment note for such carriage does not contain all the "particulars set out in art. 4, para. 4, sub-para. 2 (*a*) to (*f*) "and sub-paras. 4 and 5, the carrier shall not be entitled to "avail himself of those provisions of art. 20, para. 1, "sub-paras. 1 and 3, and para. 2, sub-para. 1, which exclude "or limit his liability. This provision does not apply to the "regulations prescribed by art. 4, para. 4, sub-para. 2 (*e*) and (*f*) "so far as concerns particulars of value and customs and "other charges except freight.

"*Art.* 19: *General provisions. Periods of liability.*

"Para. 2: The liability of the carriers under the provisions "of art. 20, para. 1, sub-para. 1, continues during such time "as the goods are in charge of the carrier whether in an "airport or on board an aircraft or, in the case of a landing "outside an airport, in any place whatsoever. It does not "extend to any carriage by land, by sea or by river performed "outside an airport. If however such carriage as last aforesaid "takes place in the performance of a contract for carriage by "air for the purposes of loading, trans-shipment or delivery "any damage is presumed, subject to proof to the contrary, "to have been the result of an event which took place during "the carriage by air.

"Para. 4: Goods are accepted for carriage only upon "condition that, except in so far as liability is expressly "provided for in these conditions of carriage, no liability "whatsoever is accepted by the carriers, or their employees, "or parties or undertakings employed by them in connection "with their obligations, or their authorised agents, and upon "condition that (except in so far as liability is expressly "provided for in these conditions) the consignor renounces "for himself and his representatives all claims for compensation "for damage in connection with the carriage caused directly or "indirectly to goods, or to persons who, except for this "provision, might have been entitled to make a claim, and "especially in connection with surface transport at departure "and destination, whatever may be the legal grounds upon "which any claim concerning any such liability may be based.

"*Art.* 20: *Extent of liability.*

"Para. 1: (3.) Carriers are not liable if they prove that "they and their agents have taken all necessary measures "to avoid the damage or that it was impossible for them to "take such measures. They are not liable if they prove that "the damage was occasioned by negligent pilotage or "negligence in the handling of the aircraft or in navigation, "and that, in all other respects, they and their agents have "taken all necessary measures to avoid the damage.

"(4.) If the carrier proves that the damage was caused or "contributed to by the negligence of the party suffering "damage, the court may, in accordance with the provisions "of its own law, exonerate the carrier wholly or partly from "his liability.

"Para. 2: (1.) The liability of carriers is limited to the "sum of 250 francs per kilogram, unless the consignor has "made, at the time when the package was handed over to "the carrier, a special declaration of the value at delivery "and has paid such supplementary charge as is required.

"(2.) In that case the carrier will be liable to pay a sum "not exceeding the declared value, unless he proves that that "sum is greater than the actual value to the consignor at "delivery.

"(3.) The sum mentioned above shall be deemed to refer "to the French franc consisting of sixty-five and a half milli-"grams of gold of millesimal fineness 900.

"*Art. 23: Limitation of actions.*

"Para. 1: (1.) The right to damages arising under the "provisions of art. 20, in connection with art. 1, para. 2, shall "be extinguished if an action is not brought within two years, "which may be reckoned either from the date of arrival, "or from the date on which the carriage stopped.

"(2.) All other rights arising out of the contract of carriage "shall be extinguished if an action is not brought within a "period of six months.

"Para. 2: The method of calculating the period of limita-"tation, as well as the reasons for suspension or interruption "of the period of limitation, shall be determined by the law "of the court seized of the case."

The result is that though the carriers by art. 20, para. 1, sub-para. 1, say they are liable for all damage to goods, by art. 20, para. 1, sub-para. 3, they introduce exceptions if they prove that they have taken all necessary measures to avoid damage: there is a general exception of negligent navigation, and by art. 20, para. 2, they limit their liability to 250 francs per kilogram unless the consignor makes a special declaration of value and pays the supplementary charge required. All these exceptions, however, by art. 7, para. 3, are cut out in the case of international carriage as defined by art. 1, para. 2, sub-para. 2, unless the air consignment note contains as a particular inserted by the carrier a statement that the carriage is subject to the rules relating to liability set out in the Convention of Warsaw of October 12, 1929. On the further question of limitation of actions, by art. 23, para. 1, sub-para. 1, claims for damage arising out of international carriage as defined by art. 1, para. 2, sub-para. 2, are extinguished if the action is not brought within two years: in respect of all other claims the limitation period is by art. 23, para. 1, sub-para. 2, six months. The result is that, if this is not international carriage as defined, the exceptions, including the limit of liability, apply, and further the period of limitation is six months. If this is international carriage, the exceptions, including the limit of liability, do not apply unless the carrier has inserted the express reference to the Warsaw rules as to liability, and in any case the period of limitation is two years. In the present case the alleged loss took place when the goods were in the custody of the carriers at Croydon in March, 1935, and the action was commenced in February, 1936. If, therefore, this is not a case of international carriage, the action is out of time and no further point need be considered. If it was international carriage, the action is within time, and the question of the exception has to be determined. It is convenient to dispose of this last point at once. In my opinion it is impossible for the carrier to establish that he has inserted in the air consignment note as an additional particular the statement which is required by art. 4, para. 5 (*b*). The only suggested compliance is that the general conditions which are incorporated conform in general to the rules relating to liability set out in the Convention. This does not seem to me in any way to carry out the requirement of the article, and in these circumstances in pursuance of art. 7, para. 3, the carrier is not entitled to avail himself of the exceptions, including the limitation of liability.

The contest is thus reduced to the single question whether this carriage fell within the special categories of international carriage defined by art. 1, para. 2, sub-para. 2, of the general conditions. The sub-paragraph should be read as a whole: "(2.) The special categories of international carriage referred "to in sub-para. 1 of this paragraph include all carriage "by air in which according to the contract made by the "parties the place of departure and the place of destination, "whether or not there be a break in the carriage or a trans-"shipment, are situated either within the territories of two "High Contracting Parties to the Convention of Warsaw for "the unification of certain rules relating to International Air "Transport of the 12th October, 1929, upon which these "conditions are based or within the territory of a Single "Contracting Party if there is an agreed stopping place within "a territory subject to the sovereignty, suzerainty, mandate "or authority of another Power even though that Power "is a non-contracting Power." International carriage then for the purpose of the clause may be taken to be carriage between two places within the territory of two "High "Contracting Parties" to the Convention of Warsaw: the carriage in this case was between two places within England and Belgium. At the date of the carriage England had signed the convention by her plenipotentiaries and had ratified it, while Belgium had signed but had not, at that time, ratified, as afterwards she did. The respondents say that until Belgium ratified she was not a High Contracting Party. To ascertain what the contract between the parties means by High Contracting Parties to the Convention the correct course must in my opinion be to look at the Convention itself. The phrase is one of diplomatic usage, and its use in these general conditions, based as they expressly are on the Convention, must, I think, depend upon the meaning in the Convention. This is made clearer by the fact that the definition of international carriage in art. 1, para. 2, sub-para. 2, of the general conditions repeats verbatim the language of art. 1, para. 2, of the Convention, except that the last words of the condition "even though that Power is a non-contracting "Power" are found in the Convention to be "even though "that Power is not a party to this Convention." The French version of the Convention is "autre Puissance même non "Contractante." I expect that it will be found that the French version of the general conditions uses the words of the Convention and the English of the conditions appears to be the more accurate translation. I do not think that there is any difference in meaning.

When one turns to the Convention one finds that in more than one article it is made plain that the term "High "Contracting Parties" means or more accurately includes all the signatories: "Art. 36.—The Convention is drawn up in "French in a single copy which shall remain deposited in the "archives of the Ministry for Foreign Affairs of Poland and of "which one duly certified copy shall be sent by the Polish "Government to the Government of each of the High "Contracting Parties. Art. 37.—(1.) This Convention shall "be ratified. The instruments of ratification shall be deposited "in the archives of the Ministry for Foreign Affairs for Poland "which will notify the deposit to the Government of each of "the High Contracting Parties. (2.) As soon as this Convention "shall have been ratified by five of the High Contracting "Parties it shall come into force as between them on the "ninetieth day after the deposit of the fifth ratification. "Thereafter it shall come into force between the High "Contracting Parties who have ratified and the High Con-"tracting Party who deposits his instrument of ratification "on the ninetieth day after the deposit. (3.) It shall be the "duty of the Government of the Republic of Poland to notify "to the Government of each of the High Contracting Parties "the date on which this Convention comes into force as well "as the date of each ratification. Art. 38.—(1.) This Con-"vention shall after it has come into force remain open for "accession by any State. (7.) The accession shall be effected "by a notification addressed to the Government of the "Republic of Poland, which will inform the Government of "each of the High Contracting Parties thereof. Art. 39.—"(1.) Any one of the High Contracting Parties may denounce "this Convention by a notification addressed to the Govern-"ment of the Republic of Poland which will at once inform

"the Government of each of the High Contracting Parties.
"Art. 40.—(1.) Any High Contracting Party may at the "time of signature, or of deposit of ratification or of accession, "declare that the acceptance which he gives to this Convention "does not apply to all or any of his (territory)."

I find it impossible to make sense of these provisions, except by giving High Contracting Parties the meaning of signatories, extending it to non-signatories who take advantage of the provisions as to accession. It is all the signatories who have a right to a certified copy under art. 36, to be given notice of deposit of ratification and the date on which the Convention comes into force under art. 37, paras. 1 and 2. "As soon as this Convention shall have been ratified by five "of the High Contracting Parties" cannot mean "ratified "by five of the five who have ratified." All the signatories are entitled to notice of accession under art. 38, and any of them may denounce the Convention whether they have ratified or not and all of them are entitled to information of denunciation under art. 39. While art. 40 makes that certain, which was plain enough before, for it provides for a declaration by "any High Contracting Party at the time of signature." This article also makes plain that a State which accedes is a High Contracting Party, for it expressly calls him so.

If, therefore, there were any doubt as to the meaning of High Contracting Party in diplomatic usage, this Convention has provided its own dictionary. I, therefore, am driven to the conclusion that the words in art. 1 of the general conditions have the same meaning as they have in arts. 36, 37, 38, 39 and 40 of the Convention and mean signatories. It is a perfectly correct use of the phrase ; the parties have concluded a Convention by their plenipotentiaries, and though they are not to be bound by the Convention as a whole until they have ratified, yet before ratification they have the rights and duties given to them by the articles above mentioned ; and as pointed out by Oppenheim, 5th ed., vol. i., (v.), s. 510, the two stages of consent by signature and subsequent ratification are not to be confused ; the consent is always by signature. I think, therefore, that international carriage in the Convention is intended to be defined as carriage to and from the territory of the signatories whether they do or do not eventually become bound to make the provisions of the Convention part of their domestic law. This would appear to me to be quite a reasonable stipulation to make, i.e., it leads to no absurdity which might drive one to some other construction. It follows a somewhat close analogy in the Convention and Acts relating to Carriage of Goods by Sea. The provisions there are not limited to carriage of goods to foreign countries which are either parties to the original Convention, or have bound themselves by ratification. In the present case international navigation is limited, but to the very extensive territories of the signatories, and not to the territories only of those who have ratified or acceded.

It was argued that art. 28, which provides that " an action "for damages must be brought at the option of the plaintiff in "the territory of one of the High Contracting Parties either "before the court having jurisdiction where the carrier is "ordinarily resident or has his principal place of business or "has an establishment by which the contract has been made "or before the court having jurisdiction at the place of "destination," indicates that in that article at any rate High Contracting Party must mean a party bound by the Convention. I do not think that this article affords any ground for departing from the meaning of the phrase in arts. 36–40. It would be quite a reasonable provision for any State ratifying the Convention to enforce in its domestic law ; especially if, as I think, the definition of international traffic is as wide as I take it to be.

Having therefore come to a clear conclusion in my own mind as to the meaning of High Contracting Parties to the Convention in the Convention itself, I own that I find the greatest difficulty in putting a different construction on the words when used in a commercial document, the conditions of which are said to be based on that Convention. The business man is referred to that Convention, and, if he looks at it at all, which is unlikely, it appears to me that the last thing that he would do is to say to himself that " High Contracting

"Parties to the Convention" in his consignment note means something different from what it means in the Convention itself, to which he is referred.

The result is that in my judgment, on the terms of the conditions, this carriage fell within the special categories of international carriage there defined; that the period of limitation was two years; and that the plaintiffs' claim was brought in time; and as the other defences failed, he should have the questions answered in his favour.

There remains, however, the question, which has not yet been discussed, as to the effect of the Carriage by Air Act, 1932, passed by this country to give effect to the Convention. By that Act, as from a day to be certified by Order in Council, the provisions of the Convention are to have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies. But by sub-s. 2 His Majesty may by Order in Council from time to time certify who are the High Contracting Parties to the Convention and in respect of what territories they are parties, and any such order shall be conclusive evidence of the matters so certified.

It is in respect of the Act, amongst other matters, that differences of opinion appear in the courts below. Porter J., who tried the case, took substantially the same view of the construction of the conditions and conventions that I have expressed above. But he came to the conclusion that for an English Court the certificate contained in the Order in Council was conclusive for all purposes as to who were the High Contracting Parties to the Convention; and, as at the material time Belgium had not become a High Contracting Party by Order in Council, he could not treat her as such for the purposes of this contract. And Slesser and Clauson L.JJ. did not agree with Porter J.'s view as to the effect of the Act, but they came to the conclusion that High Contracting Parties to the Convention in art. 1 meant only parties bound by ratification or accession. Greer L.J. agreed with this view of the Convention, and also agreed with Porter J.'s construction of the Act.

I do not find myself in agreement with the construction of the Act which makes it affect this contract. For the purposes of contracts of air carriage upon which the Act imposes the conditions of the Convention the Legislature may and does define the contracts to which for that purpose the Convention is said to apply. I think it may be assumed that for the purpose of the Act the Legislature intended to confine international carriage to the territory of States bound by the Convention. The result is perhaps remarkable, for until there is an Order in Council it matters not whether the State is in fact bound or not; and it was pointed out to us that in practical working there had been delays of several months before States in fact bound by ratification had been certified as High Contracting Parties. But we are not dealing with conditions the result of a statute, but contractual conditions independent of the statute; and for their purposes I venture to think that the statute has no operation at all.

For these reasons I think that this appeal should be allowed and that the order below should be discharged, and that in its place the questions should be answered as follows:—

I. (*a*) No.
(*b*) Does not arise.
(*c*) Does not arise.
II. (*a*) Yes.
(*b*) No.
(*c*) No.
III. No.
IV. (*a*) Does not arise.
(*b*) Does not arise.
V. 10,600*l.* and interest.

The plaintiffs should have the costs here and the courts below.

LORD THANKERTON. I have had the privilege of considering the opinion of my noble and learned friend Lord Atkin which I have just read, and, subject to one doubt, as to which I desire to express my view, he has so fully and precisely expressed an opinion identical with my own, that it is sufficient to state my agreement therewith. The one point on which

Lord Thankerton.

I have felt some doubt is as to the meaning of High Contracting Party as used in the Convention of Warsaw, but I may say at once that such doubt would not affect my concurrence in the motion proposed by my noble and learned friend, for reasons which I will explain.

Belgium having been the place of destination of the consignment here in question, the question is whether at the date of the consignment note—March 5, 1935—Belgium, which admittedly had not yet ratified the Convention, was a High Contracting Party to the Convention of Warsaw within the meaning of art. 1, para. 2, sub-para. 2, of the general conditions of carriage, known as the orange book? In the first place, I may state that, in my opinion, this question must be decided on construction of the terms of the contract as expressed. The Court has no right to assume any antecedent probability of the International Air Traffic Association having intended to confine the international carriage provided for in the orange book to cases where the places of departure and destination were within the territory of High Contracting Parties who had ratified the Convention. I do not know and I have no right to assume that the policy of the Association proceeded on this view, or whether the Association aimed at the inclusion, in contracts with its customers, of the territories of signatories of the Convention who had not yet ratified it, though their plenipotentiaries had signed it.

In the second place, it seems to me to be illegitimate to dissect the phrase, and to consider first what "contracting parties" would have meant if it had stood alone, and then to see if any meaning can be given to the word "high." I regard as important the subsequent words "upon which these "conditions are based." I find then that a phrase, unusual in commercial contracts, is used in a commercial contract, coupled with a statement that the contractual provision is based on a well known form of diplomatic convention, in which that phrase is in familiar use, and I feel compelled to the conclusion that the meaning of the phrase in the commercial contract is derived from, and based upon, the meaning which it bears in the diplomatic document thus referred to. I am

Lord Thankerton.

glad to find that so far the three learned judges of the Court of Appeal came to the same conclusion, but, on consideration of the terms of the Convention, they came to a different conclusion from that expressed by my noble and learned friend. I have had the privilege also of considering the opinion about to be delivered by my noble and learned friend Lord Russell of Killowen, and I observe that he differs on both these points from the learned judges of the Court of Appeal, though he arrives at a similar conclusion by a different road.

Turning to the terms of the Convention, I agree with the view expressed by the noble lord on the Woolsack as to arts. 36 to 40, but I think it may be said that the High Contracting Parties referred to in art. 1, para. 2, and art. 28 can only apply to those which have bound themselves by ratification. It seems to me that the Convention has been drawn on the footing that all the signatories have ratified. If I am correct in the above construction of arts. 1, para. 2, and art. 28, it will follow that the phrase as used in the orange book is ambiguous, in which case I am of opinion that the principle applied in the cases of *Elderslie Steamship Co.* v. *Borthwick* (1) and *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.* (2), falls to be applied here, and that the respondents, who prepared the contract, must take the consequences of their failure to make the limitation, which they claim, clear to the other contracting parties, and that the appeal succeeds on this point.

LORD RUSSELL OF KILLOWEN. Two things in this case seem to me plain. The first is that since Belgium had not at the date of the consignment note (namely, March 5, 1935), ratified the Warsaw Convention, the carriage of goods by air which was contemplated in and covered by that note (which I will refer to as the carriage in suit) was not one to which the Convention applied. The second is that the provisions of the Convention as set out in the First Schedule to the Carriage by Air Act, 1932, had not the force of law in relation to the carriage in suit. The rights of the parties to this litigation

(1) [1905] A. C. 93. (2) [1908] A. C. 16.

must depend accordingly upon the true construction of the contract between them, and upon nothing else; and in particular they must depend upon the true construction of the general conditions of carriage of goods which form part of the contract by virtue of the passage in the consignment note which runs: "The consignor hereby expressly declares that the above "particulars furnished by him or his agent are correct, and "that he is aware of and accepts the general conditions of "carriage more particularly referred to on the back of this "document." It is common ground that these are the general conditions which appear on pp. 87–103 (inclusive) of the appendix. Some reliance was placed by the respondents upon certain other phrases relating to liability which are found on the back of the consignment note, but I am not satisfied that they purport to do more than summarize certain provisions of the general conditions; or that (if they depart in any way from the general conditions) they have any contractual force.

There are two main questions which arise for determination on this appeal, the answers to which depend upon the true construction of the general conditions—namely, (1.) was the right of the appellants to damages extinguished because their action was not brought within a period of six months? and (2.) was the liability of the respondents limited in amount to the sum of 250 francs per kilogram? The second question obviously does not arise if the first question is answered in the affirmative. I will take first the question of the extinction of the appellants' right to damages. That is dealt with in the general conditions by "Art. 23, Limitation of actions," which, so far as material, runs thus: "Para. 1: (1.) The right to damages arising "under the provisions of art. 20, in connection with art. 1, "para. 2, shall be extinguished if an action is not brought "within two years, which may be reckoned either from the "date of arrival, or from the date on which the carriage stopped.

"(2.) All other rights arising out of the contract of carriage "shall be extinguished if an action is not brought within a "period of six months."

It is beyond dispute that under this contract all rights arising out of it will be extinguished if no action is brought within six

Lord Russell of Killowen.

months, unless the right be a right to damages to which para. 1, sub-para. 1, of art. 23 applies. Further it is beyond dispute that para. 1, sub-para. 1, of art. 23 only applies if the carriage in suit, which no doubt was international carriage, falls within one of the special categories of international carriage defined in art. 1, para. 2, sub-para. 2. The provisions of paras. 1 and 2 of art. 1 are all-important. Their wording is as follows: [His Lordship read them as already set out in the judgment of Lord Atkin.]

The only special category of international carriage into which the carriage in suit could possibly fall is that which is defined as one in which "the place of departure and the place of "destination . . . are situate . . . within the territories of "two High Contracting Parties to the Convention of Warsaw." In the carriage in suit the place of departure was in Great Britain, and the place of destination was in Belgium. At the date of the consignment note, however, although Great Britain had ratified the Convention and was bound by its terms to the other nations which at that date had ratified it and become bound by its terms, Belgium had not ratified the Convention and was not subject to its provisions. It is true that Belgium had, by representatives, signed the Convention when it was originally signed by some (but not all) of the Powers named as parties thereto. But such signature carried with it no consequences. By its own terms (art. 37) the Convention required to be ratified, and it only came into force at all if and when five parties had ratified it, and then only on the ninetieth day after the deposit of the fifth ratification. Thereafter it only came into force as between them and any other party on the ninetieth day after the deposit of that party's ratification. There was no obligation of any kind to ratify, and even after ratification there was complete freedom to "denounce," i.e., to withdraw from the convention.

The sole question which has to be answered on this part of the case can now be posed. It is this: Was Belgium on March 5, 1935, a High Contracting Party to the Warsaw Convention *within the meaning of the contract?*

I emphasize the last six words because in my opinion it is wholly irrelevant to inquire whether Belgium was or was not at that date a High Contracting Party within the meaning of the Convention. I have no doubt that Belgium was a High Contracting Party within the meaning of many of its clauses. A Power may, however, well be a High Contracting Party within the meaning of the Convention or within the meaning of some of its clauses, and yet not be a High Contracting Party within the meaning of the contract. The words which we have to construe are "High Contracting Parties to the Convention." The words are not "High Contracting Parties within the meaning of the Convention," or "described in the Convention" or "referred to in the Convention," nor does any one of those phrases represent the normal meaning of the words used in the contract. The words used in the contract describe, according to their normal meaning, parties who are in fact High Contracting Parties to the Convention, i.e., who have contracted to be bound by the terms of the Convention. Let me consider whether there is anything in the contract, or in the surrounding circumstances, which would justify us in saying that the parties to the contract or either of them used the words in a sense other than their normal meaning. In this consideration certain relevant matters must be borne in mind.

(1.) This is not a diplomatic document couched in the language of diplomacy. It is a commercial contract for the carriage of goods. If it be true (as to which I know not) that in the language of diplomacy a contracting party provided he be "high," includes a party who does not contract, then I can only say that lawyers and diplomats speak in different tongues ; and that without some special context a reference to a contracting party (whether high or lowly) in a commercial contract is a reference to someone who binds himself contractually. The words in their ordinary meaning are inapt to describe some one who is free from all contractual bonds, or (in this case) to include a Power which, to use the words of the very clause which we are construing, is a non-contracting Power.

(2.) The contract is a common form contract (applicable to all carriage of goods internal and international) prepared by the Air Navigation Companies in view of the provisions which would apply in the cases of international carriage which would be governed by the Convention as different Powers from time to time ratified it. This form was presumably prepared with an eye to the advantage and protection of the companies; and it shows plainly what provisions were considered to be necessary or advisable as regards carriage to which the Convention could not apply—namely, "internal carriage." But as regards international carriage between two countries which would become bound by the Convention the power of the companies to frame the provisions of their common form of contract was limited and restricted by the provisions of the Convention. It was therefore necessary to provide in the contract that in such cases of international carriage the provisions of the Convention should apply. But the necessity for this would only exist in those cases of international carriage to which the Convention would apply; and there is no reason which suggests itself or has been suggested to me, why the companies should be willing to vary the provisions which (apart from the Convention) they deemed necessary and proper and for which they stipulated in regard to all carriage of goods by air, except in cases where the binding force of the Convention would compel them so to do.

(3.) All the seven provisions of the general conditions which are enumerated in art. 1, para. 2, sub-para. 1, and which are only to apply to the special categories of international carriage as defined, are provisions which had perforce to apply if the carriage was governed by the Convention. I will take the last two as samples. Art. 22, para. 4, sub-para. 2, of the general conditions carries out the compulsory provisions of art. 28, para. 1, and art. 32 of the Convention, and deprives the companies in the cases of the "special categories" of international carriage of the benefit of only being sued in the Court of their principal place of business. Art. 23, para 1, sub-para. 1, carries out the compulsory provisions of art. 29, para. 1, and art. 23 of the Convention, and deprives the companies in the like cases of the benefit of the six months' limitation.

When these considerations are borne in mind the reason and necessity for art. 1, para. 2, of the general conditions become plain. The only reason and the only necessity for its

Lord Russell of Killowen.

insertion are to be found in the compulsion of the Convention, and that compulsion only exists (*a*) where the two Powers which own respectively the place of departure and the place of destination are both bound by the Convention, or (*b*) where the two places being within the territory of a Power so bound, there is an agreed stopping place within the territory of another power, even though that Power is " a non-contracting "Power," i.e., is not so bound. Once the reason for the definition of " special categories " of international carriage is seen, the limits of the definition become apparent. The compulsion of the Convention operates both to produce the definition and to define its scope.

I can conceive no reason for suggesting that the carrier here used the words High Contracting Parties to the Convention in a sense other than the meaning which they normally bear, namely, as a description of Powers which are contractually bound by the Convention. Nor can I see any ground for suggesting that the customer who signed the contract and read (if he ever did read) the general conditions would, or could, imagine that the words in question applied to or included a Power which had not contracted, and which in fact and in law was what the clause itself calls " a non-contracting "Power." In my opinion there is no ambiguity in the clause. It means what it says, namely, parties who are contractually bound by the Convention.

It is suggested that the true view is that the companies were satisfied with the provisions of the Convention as to international carriage, and were accordingly willing that those provisions should apply to all international carriage between countries which either at any time by ratification or accession became bound by the Convention, or which had signed without thereafter becoming bound by ratification. Such international carriage might well cover the whole of the habitable globe; and it is not easy on this view to understand how or why it could have been worth while to set up or define any special categories of international carriage at all.

For the reasons which I have stated I feel no doubt that the words " High Contracting Parties to the Convention " in this contract mean Powers which are contractually bound by the provisions of the Convention, i.e., Powers which have signed and ratified and Powers which have acceded. I am in agreement with the unanimous opinions of Greer, Slesser and Clauson L.JJ., from whom I am not conscious of differing.

As regards the second question, this does not in my view arise. If it did, the same reasoning would apply in favour of the respondents. In my opinion there was neither a special declaration of value made, nor a supplementary charge paid, under art. 20, para. 2, sub-para. 1, of the general conditions, consequently the limitation of liability thereby provided would apply. The carrier would not be deprived of this benefit by the second sentence of para. 3 of art. 7 of the general conditions, since that provision only applies to the special categories of international carriage, and the carriage in suit does not come within them.

If, however, my view on the first question were wrong, and the carriage in suit comes within the special categories, then I would be of opinion that the carrier could not claim the benefit of the limitation of the quantum of liability because the consignment note did not contain the statement required by art. 4, para. 4, sub-para. 5 (*b*), of the general conditions.

But, as already indicated, I think that the order of the Court of Appeal should be affirmed, and I would dismiss this appeal.

LORD MACMILLAN. I agree with what I understand to be the opinion of all your Lordships that the conditions on which the respondents undertook to convey by air the consignment of gold coins in question from Croydon to Brussels are, in terms of the relative consignment note, to be found in the General Conditions of Carriage of Goods annexed to the agreement concerning the Contract of Carriage by Air made in 1931 between the Air Navigation Companies, members of the International Air Traffic Association. The agreement was entered into after the signing at Warsaw on October 12, 1929, of an international Convention for the unification of certain rules relating to International Carriage by Air, and with the provisions of that Convention in view.

The third chapter of the Convention contains a series of important provisions relating to the liability of carriers by air and is designed to secure that these shall not be evaded. A time limit of two years is also imposed on claims for damages.

It is important to observe that the signing of the Convention by the parties to it did not of itself impose any restriction on freedom of contract in the matter of carriage by air. It was only as and when it became legally effective by ratification or ratification plus legislation that its terms could operate to restrict the freedom of air carriers to make such contracts as they chose with their customers. The General Conditions appear accordingly to have been framed so as to provide (1.) for cases where the traffic was governed by the Convention and (2.) for cases where the traffic was not so governed and the carrier remained free to make his own terms. The conditions applicable to the latter case are, as might be expected, more favourable to the carrier in the matter of restriction of liability and limitation of the period for making claims.

The General Conditions thus differentiate certain special categories of international carriage from international carriage in general. It is as regards these special categories that the terms conforming to the Warsaw Convention are to operate, and the special categories are to include all carriage by air between the territory of one High Contracting Party to the Convention of Warsaw and the territory of another High Contracting Party. The carriage in question in the present case was between Great Britain and Belgium. Was this carriage between the territory of one High Contracting Party to the Convention of Warsaw and the territory of another High Contracting Party within the meaning of the General Conditions? If it was, then under the General Conditions the more liberal terms conforming to the Convention of Warsaw were applicable to it. If it was not, then the terms less favourable for the customer were applicable.

Great Britain and Belgium were both parties to the Convention of Warsaw which was signed by their respective representatives, but while Great Britain had ratified it at the date of the consignment note in question, and embodied it in an Act of Parliament, Belgium had not ratified it.

I recognize that in many clauses in the Convention itself the expression " High Contracting Parties " is used to denote the countries whose representatives signed and concluded the Convention. But the Convention itself recognizes a distinction between the signing and concluding of the Convention on the one hand and its coming into force on the other hand. It is not to come into force at all until five High Contracting Parties have ratified it and thereafter it is to come into force as regards the other High Contracting Parties when they ratify it and as regards acceding States when they accede to it—in each case after an interval of ninety days.

The question is whether in the General Conditions the expression High Contracting Party to the Convention of Warsaw means any party who has signed the Convention or any party as regards whom the Convention has come into force. To my mind the important question with regard to each country from the point of view of those who were proposing to enter into a contract of air carriage was not whether that country's representative had signed the Convention of Warsaw but whether as regards that country the Convention was in force. It was only as between countries both bound by the Convention of Warsaw that the carrier's freedom to make or impose his own terms was restricted. Where both countries were not so bound the carrier could without infringing the law stipulate for terms more favourable to himself than the Convention allowed.

In my opinion the cardinal distinction which the General Conditions have in view is the practical distinction between countries which are bound and countries which are not bound by the Convention and I therefore read the expression " High "Contracting Party to the Convention of Warsaw " in the General Conditions as meaning a party in whose case the Convention is in force. I reach this conclusion with becoming diffidence in view of the contrary opinion of the majority of your Lordships, but I am consoled by the fact that I am not alone in the view which I have formed on the difficult question involved, and that I have the support of the more fully developed arguments of my noble and learned friend Lord Russell of Killowen which I desire to adopt. The result, so far as I am concerned, is that I should be in favour of dismissing the appeal.

LORD WRIGHT. The Court has been asked to answer a number of specific questions arising on the construction of a contract of carriage of goods by air entered into between the appellants as consignors and the respondents as carriers. These questions have been answered in the respondents' favour by the Courts below. I am of opinion, with the greatest respect to those whose opinions are different, that the answers should be in favour of the appellants.

The contractual document which has to be construed is called an Air Consignment Note, the body of it being in print but the particulars relevant to the specific transaction being in writing, signed by the appellants' agent, who in terms "accepts "the general conditions more particularly referred to on the "back of this document." On the back it is stated that "the "General Conditions of Carriage are applicable to both internal "and international carriage. These General Conditions are "based upon the Convention of Warsaw of 12th October, 1929, "in so far as concerns international carriage within the special "meaning of the said Convention." The "General Conditions" have been identified for purposes of this case as being those contained in what has been called the "orange booklet" which sets out an agreement concerning the contract of carriage by Air, dated 1931. The document is headed International Air Traffic Association the members of which are it seems the air transport undertakings (carriers). The crucial question of construction is whether this particular contract is "international carriage" within the meaning of art. 1, para. 2, sub-para. 2, of the General Conditions. If it is "international carriage" then the period of limitation for actions (art. 23, para. 1) is two years, and not six months, which is the period specified if the carriage is not "international." The latter period would bar the appellants' claim in this action. Furthermore, if the carriage is "international," the respondents would not be entitled to avail themselves of the limit of liability of 250 francs per kilogram (art. 20, para. 2, sub-para. 1) or of the benefit of the terms which exclude or limit their liability because the consignment note did not contain the statement required by art. 4, para. 4, sub-para. 4 (*b*), that "the carriage is "subject to the rules relating to liability set out in the "Convention of Warsaw of 12th October, 1929, upon "which these conditions are based." Such an omission prevents the carrier, by reason of art. 7, para. 3, from relying on these terms.

It is, I think, clear that what is meant by "international carriage" in the contract must depend on what it means in the Convention. The contract expressly states that what is meant is international carriage "within the special meaning of "the said Convention." It is accordingly necessary to turn to the Convention to see what that special meaning is. Art. 1, para. 2, of the Convention is in these terms (I quote throughout from the English version): "For the purposes of this Convention the expression 'international carriage' means any "carriage in which, according to the contract made by the "parties, the place of departure and the place of destination . . . . "are situated either within the territories of two High Contracting Parties, or within the territory of a single High "Contracting Party, if there is an agreed stopping place "within a territory subject to the sovereignty, suzerainty, "mandate or authority of another Power, even though that "Power is not a party to this Convention. A carriage without "such an agreed stopping place . . . is not deemed to be international for the purposes of this Convention." It is thus clear that the word international has a special meaning in the Convention. That is what is referred to in the definition in the contract which I have quoted. This is confirmed by the definition contained in art. 1, para. 2, sub-para. 2, of the General Conditions, of "the special categories of international "carriage referred to in the preceding sub-para. 1 of this "paragraph, as being 'international' carriage for the special "purposes of the Conditions." This is clearly meant to point the contrast with any other categories of international carriage by air. The definition in the General Conditions is identical in substance with that in the Convention and requires that the agreed places of departure and destination should be either within the territories of two High Contracting Parties, adding, what is not necessary in the Convention itself, the words "to the Convention of Warsaw, etc., or within the territory of "a Single Contracting Party (omitting the word 'High') if "the agreed stopping place is within the territory subject to "another Power, 'even though that Power is a non-contracting "'power.'" It has been claimed that the words "High "Contracting Party" have a different meaning in the Conditions from that which they have in the Convention. In my opinion, this is not the true construction. It is, I think directly contrary to the express words I have quoted from the back of the consignment note ("international carriage within the "special meaning of the said Convention") which expressly refer to the definition in art. 1, para. 2, of the Convention, and is directly contrary to the definition in art. 1, para. 2, sub-para. 2, of the General Conditions which in the material passage define the places of departure and destination as places within the territories of two "High Contracting Parties to the "Convention." What is there meant must depend on ascertaining what are "High Contracting Parties" within the meaning of the Convention itself. It is, I think, impossible to hold that there is a High Contracting Party within the meaning of the Consignment Note which is not a High Contracting Party within the meaning of the Convention.

It is accordingly necessary to determine what is the meaning of these words in the Convention. That must be determined by construing the Convention. It is said by the appellants that the words mean any State originally a signatory to the Convention, even though the State has not "ratified" it. For instance, though Belgium, the State to which this particular consignment was destined, did not "ratify" until 1936, the consignment in question being in 1935, it was, it is claimed, an original signatory and was therefore a High Contracting Party within the meaning of the Convention. It is not material to this point that the Convention contemplates another class of High Contracting Parties, namely, those who though not original signatories, subsequently accede, a class which includes the United States. On this construction the carriage in question falls within the special categories of international carriage. Against this view, it is contended on behalf of the respondents that the words " High Contracting " Parties to the Convention " are limited in meaning to those Powers which have not merely signed the Convention, but have " ratified " it and thus become bound to fulfil its terms, and also to acceding Powers.

It is conceded by the respondents that at least in many places of the Convention the words " High Contracting Party " must be construed as meaning " signatory," but it is said that they should in other parts of the Convention be construed in the narrower meaning, that is of a Power which has not only signed but also ratified or has acceded. Before I give my reasons for my opinion that the words are used in the Convention as including signatory States whether or not they have ratified and also acceding States, I may observe that on the concession made by the respondents that the words can only be construed as having the narrower meaning in some places in the Convention, it follows in my opinion that the appellants' contention should succeed. The Court is here concerned with a contract of carriage. The respondents are claiming that on a particular construction of the Consignment Note and the General Conditions which it incorporates, they are entitled to limit or exclude their liability for the loss of the goods. But they are faced by the general principle applicable to contracts of carriage that a carrier who wishes to limit his liability must do so by plain words. This principle is too well established to need citation of authority. But I may perhaps refer to *Nelson Line (Liverpool), Ld.* v. *James Nelson & Sons, Ld.* (1), where Lord Loreburn said : " The law imposes "on shipowners a duty to provide a seaworthy ship and to "use reasonable care. They may contract themselves out of "those duties, but unless they prove such a contract the duties

(1) [1908] A. C. 16, 19.

"remain; and such a contract is not proved by producing "language which may mean that and may mean something "different. As Lord Macnaughten said in *Elderslie Steamship* "*Co.* v. *Borthwick* (1), 'an ambiguous document is no "'protection.'" Lord Loreburn was dealing with a shipowner's contract of carriage, but the same principle applies mutatis mutandis to a contract of air carriage so far as they contain terms limiting or excluding the carrier's prima facie liability. *Elderslie Steamship Co.* v. *Borthwick* (1) is to the same effect. In particular, Lord Lindley emphasizes the other aspect, the position of the shipper. He says (2): "This is "a contract between two persons, one of whom, the shipowner, "prepared it. I have not the slightest doubt that the ship-"owner understood it as Mr. Carver says he did. But when I "look at it from the other side, and consider whether the shipper "would so understand it, I say, if I were myself a shipper, "certainly I should not . . . . I agree that this bill of lading "did not employ plain terms and relieve the shipowner from "liability in the case of unseaworthiness. I mean by 'plain "terms' terms sufficiently plain to the shipper for him to "understand it." The principle so stated is not in my opinion limited to carriage by ships or to the warranty of seaworthiness. It equally applies to a contract of carriage by air, like that in question, and to the statement therein of the conditions on which the carriers' claim to exemption depends. These conditions must be stated in terms sufficiently plain for the shipper or consignor to understand. He is entitled, if they are not plain, to interpret them in the sense most favourable to him and least in favour of the carrier's exemption from liability under the contract. That is so whenever the exemptions are reasonably capable of a narrower and a wider construction. It is, I think, impossible here to say that a shipper could not reasonably construe the words "High "Contracting Parties" as including signatories to the Convention. It is said that to do so would be counter to the intention of the carriers, because, for instance, art. 23, paras. 1 and 2, which provides that all other rights (other, that is,

(1) [1905] A. C. 93, 96.

(2) Ibid. 96, 97.

than those arising in connection with international carriage), shall be extinguished if an action is not brought within six months, can only have been inserted to provide for international carriage not falling within the special categories, because the Convention in those cases fixes two years as the period. But the General Conditions (art. 1, para. 1) not only deal with the special categories of international carriage but also deal with internal carriage and there may be cases of international carriage in which the places of departure and destination are both in territories of States which were not even signatories to the Convention, so that no inference as to the carrier's intention can well be drawn from that. But again the question is not limited to the question of the carrier's intention, in the same way as the question of intention may be limited in the case of unilateral instruments like wills or settlements where the settlor's or the testator's intention is paramount. The question is whether the limitations of liability have been brought home in what the Court regards as plain terms to the shipper's or consignor's mind by the language used. It would have been easy to have stated in the General Conditions that "International Carriage" means carriage between countries which have either signed and also ratified the Convention or acceded to it.

But to my mind the construction for which the appellants contend is the true construction. The words "High Contracting "Parties" are words of diplomacy and are the words normally used to describe plenipotentiaries such as those who met at Warsaw. They are stated in the recital to the Convention to have "concluded and signed it, being thereto duly "authorised." To do so was their function and it rested with their respective governments whether they would go further and ratify it, that is, adopt it, so as to become internationally bound to fulfil its terms, and if necessary for that purpose take any further steps by legislation or otherwise to make it part of their law. The United Kingdom ratified on February 14, 1933, Belgium not till October 11, 1936. But their plenipotentiaries had signed the Convention in 1929, thereby accepting its conditions as those to which they agreed. A treaty is concluded as soon as the mutual consent is manifest from acts of the duly authorized representatives, though its binding force is as a rule suspended till ratification is given. See Oppenheim on International Law, Part IV., Chapter II. (v.), s. 510. There are several of the articles which are only consistent with this meaning of the words "High Contracting Parties." Thus art. 36 provides that the single copy of the Convention should remain deposited in the Polish archives and one duly certified copy be sent by the Polish Government to each of the High Contracting Parties. Art. 37 says that deposit of instruments of ratification shall be notified to each of the High Contracting Parties. In these articles, High Contracting Parties must include signatories. Art. 37 also speaks of High Contracting Parties as ratifying, thus clearly treating ratification as a separate and further act by a High Contracting Party. Art. 40 provides that any High Contracting Party may at the time of signature or of deposit of ratifications or of accession make a declaration that the Party's acceptance of the Convention does not apply to Colonies or so forth. Thus it is clear that the Party may be a High Contracting Party as at the time of signature, whether or not the Party subsequently ratifies. Ratification is treated as being a matter distinct from signing. Accession here referred to is dealt with in art. 38. Accession it is provided is open to any State which was not a signatory. Accession is effected by notification which has the combined effect of signing and of ratifying. The acceding State thus becomes at one blow not only a High Contracting Party but one who has ratified. But such a State is clearly within the category of High Contracting Parties, as shown, for instance, by art. 40, which treats as High Contracting Parties (1.) those who have signed; (2.) those who have both signed and ratified; (3.) those who have acceded. This seems to me to answer a difficulty which impressed the Court of Appeal. Again the Additional Protocol confirms this interpretation. In so far as a different construction of "High Contracting "Party" as used in the Convention and in the General

Conditions is adopted in *Grein* v. *Imperials Airways, Ld.* (1), I cannot with all respect agree with the reasoning of the Court of Appeal in that case.

Thus I construe the words of the Convention. This I think is its plain and normal meaning. I am unable to qualify that construction by speculating on the intention of the parties who settled the General Conditions of 1931. Reference was made to art. 22, para. 4, of the General Conditions, which fixes the forum for bringing actions and stipulates that the national law of the Court so seised of the case should apply. Para. 4, sub-para. 2, provides that actions arising out of international carriage under the Convention must be brought in substantially the same forum as that stipulated by art. 28 of the Convention. I cannot see why this should not apply to include signatory States, even if they have not ratified, who may find the provisions convenient for their nationals just as much as if they had ratified. Neither in the Convention nor in the General Conditions is there expressed any limitation of the meaning of " High Contracting Parties " for the purposes of art. 28 and art. 22 respectively. I cannot attach any importance to the substitution in art. 22, para. 4, sub-para. 2, of the words " contracting party to the Convention " for the words " High Contracting Parties to the Convention " in art. 28. It is merely a case of loose verbiage, which cannot control the whole tenor of the document.

Accordingly both on what is in my opinion the clear and unambiguous construction of the words " High Contracting " Parties " and on the considerations to be drawn from the general effect of exceptions in a contract of carriage, I am of opinion that the appellants' contention is right, and that the questions should be answered in the sense contended for by the appellants.

I have not thought it necessary to deal at any length with the contention that the position is changed in virtue of the Carriage by Air Act, 1932. I agree with all the members of the Court of Appeal that the Act does not affect a contract like that in question. The Act was passed before ratification

(1) [1937] 1 K. B. 50.

H. L. (E.)
1939
PHILIPPSON
v.
IMPERIAL
AIRWAYS, LD.
Lord Wright.

of the Convention by Great Britain. It was (inter alia) to enable Great Britain to give statutory effect to the Convention when it ratified. It provided that as from such a day as should be certified by Order in Council the provisions of the Convention should so far as relates to carriage by air have the force of law in the United Kingdom. It also empowered His Majesty by Order in Council to certify who are the High Contracting Parties to the Convention. This, though it constitutes a statutory definition, is limited in my opinion to the purposes of the Act and the obligatory provisions which it contains, and it does not interfere with freedom of contract outside the defined spheres, or say who are to be or who are not to be deemed High Contracting Parties for contractual purposes outside the scope of the Act. It therefore affords no guidance on the construction of the contract. I do not think it necessary to say anything on the other points which have been discussed.

In my opinion the appeal should be allowed.

Order of the Court of Appeal reversed.
Lords' Journals, March 2, 1939.

Solicitors: *Ince, Roscoe, Wilson & Glover*; *Beaumont & Son.*

Dictum of Lord Porter, at p. 392, applied. Irvin v. Hine. [1949] 2 All E.R. 1089.

Applied. Irvin v. Hine [1950] 1 K. B. 555

[HOUSE OF LORDS.]

ROBERTSON . . . . APPELLANT;

AND

PETROS M. NOMIKOS, LIMITED. . . RESPONDENTS.

H. L. (E.)*

1939

March 13, 14;
May 9.

Insurance (Marine)—Insurance on hull—Insurance on freight—"In the "event of constructive total loss of steamer"—Incorporation of Institute Time Clauses, Freight—Vessel damaged by fire—Cost of repairs more than insured value—Vessel when repaired worth more than cost of repairs—Charterparty not performed—Freight not received—No abandonment to hull underwriters—Claim against hull underwriters for partial loss and against freight underwriters for constructive total loss—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 60, 61.

The respondents were insured in respect of the hull and machinery of their steamer valued at 28,000*l.* for twelve months from July 30, 1936, and by a Lloyd's policy they were insured in respect of the steamer in the sum of 4110*l.* on freight chartered or otherwise for twelve months from July 20, 1936, this policy being subject to the Institute Time Clauses—Freight, the material clauses of which were as follows: "5. In the event of the total "loss, whether absolute or constructive, of the steamer, the "amount underwritten by this policy shall be paid in full, "whether the steamer be fully or only partly loaded or in ballast, "chartered or unchartered." "6. In ascertaining whether the "vessel is a constructive total loss the insured value in the policies "on ship shall be taken as the repaired value, and nothing in "respect of the damaged or break-up value of the vessel or wreck "shall be taken into account." "8. Warranted free from any "claim consequent on loss of time whether arising from a peril "of the sea or otherwise."

The respondents chartered the steamer to carry a cargo of oil from Venezuela to the United Kingdom at a certain freight. The steamer went to a port for repairs, and while there was, on October 31, 1936, damaged by an explosion followed by fire. The repairs were estimated to cost 37,000*l.*, but as when repaired she would be worth 45,000*l.*, the respondents did not abandon her to the hull underwriters but had her repaired at the estimated cost, and claimed as for a partial loss from the hull underwriters and were paid by them 27,000*l.* The charterparty was not performed, and the respondents consequently did not receive the freight payable thereunder. They then claimed 4110*l.* from the underwriters of the freight policy, but as the latter refused to pay, the respondents brought an action to recover the amount :—

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* *Present:* Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, and Lord Porter.

Held, that the respondents were entitled to recover the amount insured by the freight policy as there had been a constructive total loss of the steamer, and that it was not necessary that the respondents should have actually given notice of abandonment to the hull underwriters.

Opinion reserved by Lord Atkin and Lord Thankerton whether the claim was in any view consequent on loss of time.

Per Lord Wright: The loss under clause 5 occurred eo instanti, and did so none the less because the respondents retained and repaired the vessel. The sole condition under that clause was that the vessel should be an actual or constructive total loss. Clauses 5 and 8 had to be read together, but clause 8 could not control clause 5.

Roura & Forgas v. *Townend* [1919] 1 K. B. 189 approved and applied.

Bensaude v. *Thames and Mersey Marine Insurance Co.* [1897] A. C. 609 distinguished.

Decision of Court of Appeal [1938] 2 K. B. 603 affirmed.

APPEAL from a decision of the Court of Appeal. (1)

In an action by the owners of the steamship *Petrakis Nomikos* against the underwriters of a freight policy to recover for the loss of freight due thereunder the following statement of facts was agreed :—

By policies dated August 28, 1936, subscribed by various Lloyd's underwriters and certain insurance companies, the plaintiffs were insured in respect of the *Petrakis Nomikos* on hull, machinery, etc., valued at 28,000*l.* for twelve calendar months from July 20, 1936, as employment might offer. The policies provided that in the event of the total or constructive total loss of the vessel, the policies were only to pay their proportion of 14,000*l.*, and that for valuation and disbursements clause purposes the insured value of the vessel was to be taken as 28,000*l.*, so that the value for constructive total loss purposes was 28,000*l.* In respect of particular average, the policies stipulated for a deductible franchise of 1000*l.*

By a Lloyd's policy dated August 28, 1936, subscribed by the defendant and others, the plaintiffs were insured in respect of the vessel in the sum of 4110*l.* on "freight, "chartered or otherwise, in and/or over" for twelve calendar months from July 20, 1936, as employment might

(1) [1938] 2 K. B. 603.

H. L. (E.)
1939
ROBERTSON
v.
PETROS M.
NOMIKOS,
LD.

offer. The policy was subject to the Institute Time Clauses—Freight, which provided (inter alia) as follows:—

"5. In the event of the total loss, whether absolute or "constructive of the steamer, the amount underwritten "by this policy shall be paid in full, whether the steamer "be fully or only partly loaded or in ballast, chartered or "unchartered.

"6. In ascertaining whether the vessel is a constructive "total loss the insured value in the policies on ship shall be "taken as the repaired value. . . . ."

"8. Warranted free from any claim consequent on loss "of time whether arising from a peril of the sea or otherwise."

Of the said sum of 4110*l.* the defendant subscribed for 18*l.* 5*s.* 4½*d.*

At all material times the plaintiffs, as owners of the vessel, were fully insured in the said policy.

By a charterparty dated September 23, 1936, the plaintiffs chartered the *Petrakis Nomikos* to carry a full cargo of crude oil (about 10,000 tons) for a voyage from Venezuela, Aruba, or Curaçao to the United Kingdom or Continent at a freight of 7*s.* 9*d.* or 8*s.* 3*d.* Lay days were not to begin before October 25, and the cancelling date was November 10.

Having completed the discharge of a cargo of fuel oil the *Petrakis Nomikos*, on October 18, 1936, left Havre in ballast for Rotterdam for repairs to her furnaces and tubes before proceeding to her port of loading under the charterparty; but, while undergoing those repairs, a violent explosion occurred on board on October 31, followed by a fire, the result being that the after part of the steamer and the cross bunkers were completely burnt out.

The plaintiffs obtained tenders for repairs, the lowest being 37,400*l.* The plaintiffs estimated that owing to the increase in tonnage values the steamer when repaired would be worth about 45,000*l.*, and they accordingly decided on December 18, 1936, to accept the tender and not abandon to their hull underwriters. The plaintiffs thereupon claimed as for a partial loss from the underwriters on the hull and machinery policies and the underwriters paid 27,000*l.*

(28,000*l.* less the 1000*l.* franchise). The repairs were completed on May 31, 1937, and the steamer was thereafter used as a freight-earning instrument by her owners.

It was agreed that the steamer could not have been repaired for less than 37,000*l.*, and that her value when repaired would be about 45,000*l.* The charterparty was never performed, and the plaintiffs had not received any part of the freight payable thereunder.

The plaintiffs, about February 26, 1937, claimed 4110*l.* under clause 5 of the Institute Time Clauses of the freight policy from their insurers, including the defendant, but the insurers refused to pay the claim.

The question for decision by the Court was whether in the circumstances set out the plaintiffs were entitled to recover 18*l.* 5*s.* 4½*d.*, being the defendant's proportion of the 4110*l.* insured under the freight policy.

Goddard J., before whom the question came in the first instance, held that, although the clause on which the claim was based provided in terms for the payment of a fixed sum on the happening of a certain event, it was none the less an insurance and it must therefore be proved that the loss of the freight was caused by the ship becoming a constructive total loss; that there had been no constructive loss, as the ship was never abandoned to the hull underwriters; and accordingly he gave judgment for the underwriters.

The shipowners appealed, and the Court of Appeal reversed the decision of Goddard J., holding that the plaintiffs were entitled to recover the amount insured by the freight policy as there had been a constructive total loss of the steamer, inasmuch as she had been so damaged by insured perils that the plaintiffs would be entitled on giving notice of abandonment to recover as for a constructive total loss from the hull underwriters; and that it was not necessary that the plaintiffs should actually have given a notice of abandonment and recovered as for a constructive total loss from the hull underwriters.

The underwriter appealed to this House.

H. L. (E.)
1939
ROBERTSON
v.
PETROS M. NOMIKOS, LD.

Sir Robert Aske K.C. and *W. L. McNair* for the appellant. The vessel never was a constructive total loss within the definition of that phrase in s. 60 of the Marine Insurance Act, 1906, which provides that " there is a constructive total loss "where the subject-matter insured is reasonably abandoned "on account of its actual total loss appearing to be unavoid- "able." Moreover, the vessel was never abandoned. The respondents elected to treat the loss as a partial loss, repaired the vessel, and continued to use her as a freight-earning instrument, so that she was never lost to them, actually or constructively. As the Marine Insurance Act, 1906, is a codifying Act, the Court should say that the Legislature did not intend to alter the law as existing at the time of its enactment, except where an alteration was made in terms. "Abandonment," as is pointed out in Chalmers' Marine Insurance Act (4th ed.), p. 86, in the case of a constructive total loss " denotes the voluntary cession by the assured to "the insurer of whatever remains of the subject-matter "insured, together with all proprietary rights and remedies in "respect thereof. . . . ." " Secondly, but incorrectly, it is "used as equivalent to notice or tender of abandonment, "that is to say, the act by which the assured signifies to the "insurer his intention to abandon what remains and claim for "a total loss." See also the observations of Lord Ellenborough in *Tunno* v. *Edwardes* (1), where he said that " in "order to have made it a total loss, there ought to have been "an abandonment, which there has not been." Again, in *Rankin* v. *Potter* (2) it was said by Martin B. in his opinion to the House of Lords that " there may be elements of an "inchoate constructive total loss, but to make such a loss of "ship there must be an abandonment." Where the assured receives full and reliable information that the subject-matter of the insurance is in imminent danger of becoming a total loss, he is bound, to entitle him to recover as for a constructive total loss, immediately to give notice of abandonment to the underwriters, and his omission to do so will not be excused because afterwards the subject-matter of the insurance is

(1) (1810) 12 East, 488, 493.

(2) (1873) L. R. 6 H. L. 83, 141.

H. L. (E.)
1939
ROBERTSON
v.
PETROS M. NOMIKOS, LD.

justifiably sold: *Kaltenbach* v. *Mackenzie*. (1) In this case the only form of loss the respondents could allege was the length of time required for effecting the repairs. The question here is not, what is the meaning of constructive total loss in the abstract, or under the Marine Insurance Act, but what it means in the particular contract, and we say that it means in this case constructive total loss plus abandonment. It is wrong to say that the shipowners are to be paid in full while they are still in possession of the vessel.

[*Roura & Forgas* v. *Townend* (2), *Carras* v. *London and Scottish Assurance Corporation, Ld.* (3), and *Coker* v. *Bolton* (4) were also cited.]

H. U. Willink K.C. and *A. A. Mocatta* for the respondents. It is not necessary for the respondents to show that the loss giving rise to the claim under the policy was due to named perils. The argument for the appellant, if accepted, would make a large inroad upon the construction of this clause since 1912, when *Coker* v. *Bolton* (4) was decided. It was also contended for the appellant that the assured must show a loss of freight by perils insured against, and the appellant asks this House to overrule *Coker* v. *Bolton.* (4) Here the policy by clause 5 contemplates that, if the ship is so damaged as to be a constructive total loss, the assured is to be deemed to have sustained a loss of freight by insured perils. In *Coker* v. *Bolton* (4) there was no loss of freight by insured perils, but the underwriters were held liable for the amount insured less the amount actually received. The Marine Insurance Act places no restriction on the extent to which by agreement the assured shall be indemnified against marine losses. Sect. 55 of the Act shows that the insurer may be liable for losses occurring independently of marine perils. A constructive total loss of the ship will always be envisaged as causing a loss of freight. Causation is in such a case quite irrelevant. Here the language of the policy shows that the parties meant to cover loss of the freight-earning capacity of the ship however caused. The construction sought to be

(1) (1878) 3 C. P. D. 467.
(2) [1919] 1 K. B. 189.
(3) [1936] 1 K. B. 291.
(4) [1912] 3 K. B. 315.

H. L. (E.)

1939

ROBERTSON
v.
PETROS M. NOMIKOS. LD.

placed on clause 5 by the appellants, namely, that liability attaches only if there has been a loss of freight by insured perils, is a most unlikely construction. In *Coker* v. *Bolton* (1) some freight was earned, but that fact did not affect the assured's right to recover the amount insured less the sum so received. In *In re Jamieson and Newcastle Steamship Freight Insurance Association* (2) the policy upon freight contained the proviso that " no claim arising from the cancelling of any charter shall be allowed." The vessel on her way to her port of loading was so delayed by perils of the sea that the contemplated voyage became impossible. It was decided that the charter had not thereby been cancelled, and that the assured was entitled to recover upon the policy.

Sir Robert Aske K.C. in reply. There is no authority supporting the respondents' contention that in such a case as this causation need not be shown. There is nothing to indicate that the parties intended to depart from the clear words of s. 55 of the Marine Insurance Act, 1906, which says that, unless otherwise provided, the insurer " is not liable for "any loss which is not proximately caused by a peril insured "against."

The House took time for consideration.

1939. May 9. LORD ATKIN. My Lords, I have had the opportunity of reading the opinions about to be delivered by my noble and learned friends, Lord Wright and Lord Porter, and I agree with their reasoning and with the motion they propose. There was a constructive total loss of the ship, for notice of abandonment is not a condition precedent of such a loss, though it is of a right to sue for such a loss. I further agree that Institute Time Clause, Freight, No. 5, overrides the provisions of clause 8. I wish, however, to reserve the question whether the claim in this case was in any view consequent on loss of time. The question appears to me to be in every case a question of fact, and the authorities should be treated from that point of view. It may prove that the words " consequent on loss of time " have received too wide

(1) [1912] 3 K. B. 315.

(2) [1895] 2 Q. B. 90.

H. L. (E.)
1939
ROBERTSON
v.
PETROS M. NOMIKOS, LD.

a construction in some of the cases, and I only desire to register a caution that it must not be assumed from the decision in this case that the loss of freight in question was in fact in consequence of loss of time.

LORD THANKERTON. My Lords, I also have had the privilege of considering the opinions about to be delivered by my noble and learned friends, Lord Wright and Lord Porter, and I agree with the reasoning and conclusions of those opinions, subject to the caution which my noble and learned friend on the Woolsack, in the opinion which he has just expressed, has made clear. I also wish to make it quite clear that I express no opinion at all—because it is quite unnecessary to do so—on the argument which was urged on behalf of the respondents that clause 5 of the Freight Clauses effected some extension of the perils insured against.

LORD WRIGHT. My Lords, this appeal raises the question of the true construction of a contract of marine insurance on a vessel named the *Petrakis Nomikos* of which the respondents are owners. The policy dated August 28, 1936, was for "4110*l.* on freight chartered or otherwise in and/or over" and was a time policy for twelve months from 6 A.M. on July 20, 1936, to 6 A.M. on July 20, 1937. It was underwritten by the appellant, along with other underwriters. It was against the usual perils—namely, of the seas, men of war, fire, and so forth. It was expressed to be subject to the Institute Time Clauses—Freight, which were set out in a slip attached to the policy. They will be referred to as the Freight Clauses. It also incorporated the hull and machinery policies on the vessel in respect of certain warranties, and contained an express warranty "that 50 per cent. (fifty per cent.) of "the hull and machinery valuation is uninsured for total or "constructive total loss." The hull and machinery policies, also for time and dated August 28, 1936, fixed the insured value at 28,000*l.* and like the freight policy contained the warranty that 50 per cent. was uninsured for total or constructive total loss. It contained the Institute Time Clauses

H. L. (E.)
1939
ROBERTSON
v.
PETROS M. NOMIKOS, LD.
Lord Wright.

(Hulls), of which reference may be made to clauses 17 and 18, which were in the following terms :—

"17. In ascertaining whether the vessel is a constructive "total loss the insured value shall be taken as the repaired "value, and nothing in respect of the damaged or break-up "value of the vessel or wreck shall be taken into account.

"18. In the event of total or constructive total loss, no "claim to be made by the underwriters for freight, whether "notice of abandonment has been given or not."

Of the Freight Clauses embodied in the policy sued upon, clauses 5, 6, 7 and 8 are material in this appeal and are as follows :—

"5. In the event of the total loss, whether absolute or "constructive of the steamer, the amount underwritten by this "policy shall be paid in full, whether the steamer be fully or "only partly loaded or in ballast, chartered or unchartered.

"6. In ascertaining whether the vessel is a constructive "total loss the insured value in the policies on ship shall be "taken as the repaired value, and nothing in respect of the "damaged or break-up value of the vessel or wreck shall be "taken into account.

"7. In calculating the amount due under this policy in "respect of any claim except under clauses 3 and 5, all "insurances on freight (including honour policies on freight) "shall be taken into consideration, and when the total of such "insurances exceeds in amount the gross freight actually at "risk only a rateable proportion of the gross freight lost shall "be recoverable under this policy, notwithstanding any "valuation therein.

"8. Warranted free from any claim consequent on loss of "time whether arising from a peril of the sea or otherwise."

The material facts can be shortly stated. On September 23, 1936, the vessel was chartered to a Belgian company to proceed to Venezuela, or Aruba or Curaçao and load a cargo of crude oil for ports in the United Kingdom or Continent. The cancelling date under the charterparty was November 10, 1936. On October 18, 1936, the vessel left Havre for Rotterdam for the purpose of repairs before starting in ballast on the voyage to Venezuela. While the repairs were being executed at Rotterdam there was a violent explosion on board followed by a fire, as a result of which the after part of the vessel and the cross bunker were completely burnt out. The cost of repairs was not less than 37,400*l.*, but as the value of tonnage had risen the repaired value of the vessel was 45,000*l.* The respondents elected not to abandon the vessel and claim as for a constructive total loss, as they obviously were entitled to do, but had the ship repaired and claimed for a partial loss up to 27,000*l.*, the total amount of the insured value under the policies, less a deductible franchise of 1000*l.* The repairs were completed on May 31, 1937, and the vessel was thereafter used by her owners, the respondents, as a freight-earning instrument. The charterparty was never performed.

The respondents based their claim on clauses 5 and 6 of the Freight Clauses and averred that the case fell within the precise terms of the clauses, in that there was a constructive total loss of the vessel, while chartered, the cost of repairs being more than the insured value in the policies on ship. They accordingly claimed payment in full of 4110*l.* under clause 5. The case was in a sense the converse of *Carras* v. *London and Scottish Assurance Corporation, Ld.* (1), where the cost of repairs was less than the insured valuation in the policy, but was more than the actual repaired value. The Court of Appeal there held that the clauses in question gave an additional right to the assured, but not an exclusive right superseding the common law rights under the policy, and that the assured were entitled to claim at common law. This decision was in that respect followed by the Court of Appeal in *Kulukundis* v. *Norwich Union Fire Insurance Society.* (2) In neither of these cases was it necessary to consider the precise construction of clauses 5 and 6. In the present case it is not contested that the respondents are entitled to frame their claim under the Institute Clauses as being a right added or alternative to the common law rights under the policy. The principal objections raised by the appellant to the claim were first,

(1) [1936] 1 K. B. 291.

(2) [1937] 1 K. B. 1.

that there was not a constructive total loss of the vessel because there had been no notice of abandonment by the owners, who on the contrary had elected to retain the vessel and claim as for partial loss, and secondly, that in any case the claim was excluded by clause 8 as being a claim consequent on loss of time because the repairs took so long as to make it impossible to perform the charterparty.

In my opinion, the appellant fails on both points. What is meant by a constructive total loss is now determined by ss. 60 and 61 of the Marine Insurance Act, 1906, which will apply to any particular contract of marine insurance unless some different meaning is imported either expressly or by implication. The question here is whether there was a constructive total loss of the vessel by insurance law. If clauses 5 and 6 are read together they cannot apply unless there are policies on ship, so as to determine what is the insured value. The appellant contends that the clauses only apply if the shipowner has elected to treat the loss under his hull policies as a constructive total loss by giving notice of abandonment of the ship. But the hull policies and the freight policy are distinct contracts and are only to be read together in so far as one incorporates the other. In the policy on freight it is only clause 6 which incorporates the hull policy so far as is relevant to this case, and then only for the purpose of introducing the insured value which is to be found in the hull policies. Clause 5 cannot be construed by considering what action the shipowner took on his hull policies. The words "constructive total loss" must have (apart from clause 6, which merely invokes the hull policy in order to get a figure of value) the same meaning as if there were no hull policy in existence at all. The test is not the shipowner's intention, or what he did under the hull insurances. In my opinion, notice of abandonment is not an essential ingredient of a constructive total loss. The appellant's argument confuses two different concepts, because it confuses constructive total loss with the right to claim for a constructive total loss. The right to claim except in certain cases depends on due notice of abandonment under s. 62 of the Act. The distinction is

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H. L. (E.)
1939
ROBERTSON
v.
PETROS M. NOMIKOS, LD.
Lord Wright.

explicitly stated in s. 61 of the Marine Insurance Act, which is as follows: "Where there is a constructive total loss, the "assured may either treat the loss as a partial loss, or abandon "the subject-matter insured to the insurer, and treat the loss "as if it were an actual total loss." The section makes it clear that the right to abandon only arises when there is a constructive total loss in fact. That is the necessary precondition to a right to abandon. The frame of the section makes it impossible to treat the right to abandon as identical with the constructive total loss. It is a superimposed right of election where there is a constructive total loss. Nor is it even a necessary ingredient of a constructive total loss, because though there is a constructive total loss, the assured may still treat it as a partial loss. The objective definition of a constructive total loss is found in the preceding section of the Act. Some difficulty has been found in interpreting that section because it consists of two parts. Sub-s. 2 is purely objective; it gives the two cases of constructive total loss of ship, the first being deprivation of possession, the second the cost of repairs. This is completely consistent with s. 61. But s. 60, sub-s. 1, is said to be inconsistent, because it makes the constructive total loss depend on the condition that the subject-matter is reasonably abandoned for either of the reasons stated. This, I think, does not qualify the definition in sub-s. 2. The two sub-sections contain two separate definitions, applicable to different conditions of circumstances. But I do not find any inconsistency between s. 60, sub-s. 1, and s. 61. Sect. 60, sub-s. 1, deals with actual abandonment, which is also an objective fact, not notice of abandonment, which may be necessary for a claim for a constructive total loss even after actual abandonment of the subject-matter insured. But if there is any inconsistency between s. 61 and s. 60, sub-s. 1, there is, in my opinion, no inconsistency at all between s. 61 and s. 60, sub-s. 2, which latter is the definition material in the present case.

I think, therefore, that there was here a constructive total loss of the ship within clauses 5 and 6. This conclusion agrees in principle with the decision of Roche J. (as he then

H. L. (E.)
1939
ROBERTSON
v.
PETROS M. NOMIKOS, LD.
Lord Wright.

was) in *Roura & Forgas* v. *Townend* (1), which was a case of capture of a ship and recapture after a long lapse of time. There was no notice of abandonment of the vessel, because she was not insured at all by her owners. The plaintiffs were not owners but charterers insuring their anticipated profits on the charter against total or constructive total loss of the steamer. Roche J. held that there was a constructive total loss within s. 60, sub-s. 2, because it had been unlikely that the owners would recover her in a reasonable time. The test was external and objective and did not depend on the shipowner's election. There was no clause corresponding to clause 6 of the Freight Clauses here. Indeed there could not be, as there was no hull insurance at all. I agree with that conclusion, which I think applies the correct principle for construing ss. 60 and 61. If, however, the question had been whether the appellant could claim, not on his freight policy but on his hull policy, without having given notice of abandonment of the vessel, the position would have been different. He would have been met by s. 62, which states the rules as to giving notice of abandonment. These only apply when the shipowner elects to abandon to the insurers under the policy the subject-matter insured by that policy, and seeks to claim as for a constructive total loss under that policy.

One of the conditions, then, of clause 5 of the Freight Clauses, namely, that there should be a constructive total loss under the hull policy, has, in my opinion, been fulfilled. No one has suggested that notice of abandonment in respect of the freight was necessary. There is no question that clause 6 has been correctly applied in regard to the cost of repairs as compared with the insured value. It now becomes necessary to ascertain what is the precise effect of clause 5. What I think the clause clearly does is to fix a conventional measure of indemnity under the freight policy where the ship has become an actual or constructive total loss. The measure of indemnity stipulated in that event is that the amount underwritten shall be paid " in full." The final words of the clause " whether the

(1) [1919] 1 K. B. 189.

H. L. (E.)
1939
ROBERTSON
v.
PETROS M.
NOMIKOS,
LD.
Lord Wright.

"steamer be fully or only partly loaded or in ballast, chartered "or unchartered," are not, in my opinion, words of limitation, but are words inserted to provide as far as possible for every circumstance in reference to insurable interest in freight which is likely to arise. The loss of the ship to the owners must involve in fact the loss of the vessel's freight-earning capacity. The first part of the final words of the clause, "whether the steamer be fully or partly loaded," may have been introduced, as Hamilton J. (as he then was) said in *Coker* v. *Bolton* (1), "for "the purpose of meeting the hardship that has long been felt to "exist that a shipowner, who has given notice of abandonment "and has consequently lost his right to the freight subsequently "earned, is precluded from suing on the policy on freight." This rule, which was founded on decisions of this House, is now embodied in s. 63, sub-s. 2, of the Marine Insurance Act. Like most other rules in the Act, it can be excluded by agreement. This hardship may also be excluded in practice, as it was done in the present case and in *Coker* v. *Bolton* (1), by a clause in the hull policy such as clause 18 of the Hull Clauses here. But these words of clause 5 may have a wider application, if required by the facts of any particular case. They do not apply to this case, in which the ship was neither fully nor partly loaded. The remaining words of the clause, "or in ballast, chartered or unchartered," seem to be intended to exclude in the most unqualified manner any other question of an assured's insurable interest in the freight. The policy is a time policy, and the intention may be to secure that even if the vessel at the time of the casualty has no cargo on board (that is, is in ballast) and has no charter, there shall be no question of insurable interest, though it is not likely that any underwriter would think of raising such a question in a case of this type. The intention may be to provide that the owner's interest in the profit-earning capacity of his ship, which is certainly a good interest in a business sense, should be deemed a sufficient insurable interest for purposes of this policy. I should see no legal obstacle why this agreement should not receive effect. Clause 5 deals with actual as well as constructive total loss. But it is

(1) [1912] 3 K. B. 315, 320.

not necessary to discuss this matter here, because the *Petrakis Nomikos* was actually chartered. Hence in my opinion the case comes under clauses 5 and 6 of the Freight Clauses, so that the respondents are entitled to succeed in their claim.

I do not think it necessary to express any final view on an argument which was strenuously urged on behalf of the respondents. This argument was to the effect that clause 5 involved some extension of the list of perils insured against which were enumerated in the policy. It was contended that all that was necessary to prove under the clause was that the loss of the vessel was due to perils insured against. Thereupon, it was said, the underwriters were liable to pay for any loss of freight, even though due to some extraneous cause, such as the bankruptcy or default of the consignee. In other words, that the condition on which payment became due was the loss, actual or constructive, of the vessel by perils insured against, as the stipulated event in which the sum due under the freight policy became payable, though it had no actual effect in causing the loss of freight. The question does not, in my opinion, as I have explained, arise in this case, and I should be content to say no more than that I reserve my opinion on it. I shall, however, out of respect to the argument advanced, add that, as at present advised, I should not be prepared to accept that construction. It would mean that the policy, pro tanto, was not a policy of indemnity, which appears to me to be inconsistent with the view of Hamilton J. in *Coker* v. *Bolton*. (1) It would also mean that in this particular respect it was not a policy of marine insurance. But Hamilton J. regarded it as a contract of marine insurance, because he held that the underwriters' title to salvage and the provisions of the Marine Insurance Act applied. The contention construes the policy as a policy pro tanto covering other than marine risks, for instance, insolvency or default of the consignee. But clauses 5 and 6 are only parts of a contract of marine insurance, which is limited to the perils set out in the body of the policy. There are no express words adding outside risks. The loss, actual or constructive, of the ship, is

(1) [1912] 3 K. B. 315.

not an added peril, but a loss or casualty operating on the freight through the ship. But the question certainly does not, as I think, arise in this case. I reserve my opinion upon it in case it should ever arise for decision.

There remains to be considered the second point taken by the appellant—namely, that the claim here is excluded by clause 8 of the Freight Clauses. So far as authority goes, such a contention has been rejected under circumstances similar in principle to the present by Roche J. in *Roura & Forgas* v. *Townend* (1), and by the Court of Appeal in *Carras* v. *London and Scottish Assurance Corporation, Ld.* (2) For the appellant, however, reliance was placed on *Bensaude* v. *Thames and Mersey Marine Insurance Co., Ld.* (3), a decision based on words identical with those in clause 8 in the present policy, but the policy there did not contain clauses like clauses 5 and 6 of the Freight Clauses. The facts, moreover, in that case were quite different. There was no constructive loss of the ship. Soon after starting on her chartered voyage she was disabled by the breaking of her main shaft due to perils of the sea. She was towed back to port, where repairs could not be effected and delay was incurred in taking her to another port where she was repaired. The charterers, as they were entitled to do by the foreign law applicable, threw up the contract. The loss of freight was caused simply by the delay in repairing the particular average damage arising from the peril of the sea, the delay being such as to frustrate the object of the adventure. Such a loss of freight would have been, apart from this special clause, recoverable under the authority of *Jackson* v. *Union Marine Insurance Co., Ld.* (4) The object of the clause was to protect the underwriters from this liability. Lord Watson, in *Bensaude's* case (5) said that but for the delay occasioned by the breaking of the shaft there would have been no loss [that is, of freight] to claim. Lord Herschell said (6) : " if the "claim depends on loss of time in the prosecution of the voyage " so that the adventure cannot be completed within the time

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(1) [1919] 1 K. B. 189.
(2) [1936] 1 K. B. 291.
(3) [1897] A. C. 609.
(4) (1874) L. R. 10 C. P. 125.
(5) [1897] A. C. 609, 613.
(6) Ibid. 614.

H. L. (E.)
1939
ROBERTSON
v.
PETROS M.
NOMIKOS,
LD.

Lord Wright.

"contemplated, then the underwriter is to be exempt from "liability." The loss of freight was due to loss of time and nothing else though arising from a peril of the sea. In my opinion it is impossible to apply this reasoning to the entirely different facts and the entirely different contract in the present case. I do not think that in the facts of the case the claim was consequent on loss of time within clause 8. Clause 8 must be read with clause 5. Under clause 5 the underwriter's liability to pay depends on the loss, actual or constructive, of the vessel. That liability accrues at once when the casualty happens, even if the exact position is not ascertained till later. If the assured has rightly given notice of abandonment of the ship, the loss dates back retrospectively to the date of the casualty. The property in the vessel then passes to the hull underwriters and the shipowner is not interested whether there is a loss of time or not. He can claim on his freight policy under clauses 5 and 6 in a proper case. Equally here the loss is complete at the date of the fire. The question of loss of time after the casualty does not enter into the question of liability. The claim under clause 5 does not depend on loss of time in the prosecution of the voyage within the language used by Lord Herschell. The fact that the vessel could not be repaired in time to make her cancelling date is immaterial under clause 5. In one sense every case of a constructive total loss based on the cost of repairs or on deprivation of possession implies that it will take some time to make the repairs or recover possession, and if a claim under clause 5 were treated as a claim consequent on loss of time, the operation of clause 5 would be defeated in the vast majority of cases by clause 8, except in the case of actual total loss. But in my opinion that is not the true construction of either clause 5 or clause 8. The loss under clause 5 occurs eo instanti, and does so none the less because the shipowner has retained and repaired the vessel. The sole condition under clause 5 is that the vessel should be an actual or constructive total loss. Clauses 5 and 8 must be read together. Clause 8 cannot control clause 5, but has its proper application in cases like

Bensaude's case. (1) I reject also the second contention advanced on behalf of the appellant.

In my opinion the judgment of the Court of Appeal was right and should be affirmed and the appeal should be dismissed with costs.

LORD PORTER. My Lords, the present appeal raises the question of the right of the respondents to recover against the appellant under the terms of a policy on freight dated August 28, 1936.

The respondents are the owners of the steamship *Petrakis Nomikos*. The appellant is an underwriting member of Lloyd's. The policy of marine insurance, upon the true construction of the terms of which the result of the present appeal depends, was underwritten by the appellant and is expressed to be "on freight chartered or otherwise in and/or over." The freight was that to be earned by the *Petrakis Nomikos*, the policy was stated to be subject to the Institute Freight Clauses, subject to the same warranties as on hull and machinery, and warranted that 50 per cent. of the hull and machinery valuation is uninsured for constructive or actual total loss.

The policy was a time policy for twelve months covering the ordinary marine risks. Attached to and forming part of it were the "Institute Time Clauses—Freight." Of these clauses three are material to the question in issue in the present appeal. They are as follows:—

"(5.) In the event of the total loss, whether absolute or "constructive of the steamer, the amount underwritten by "this policy shall be paid in full, whether the steamer be fully "or only partly loaded or in ballast, chartered or unchartered.

"(6.) In ascertaining whether the vessel is a constructive total "loss the insured value in the policies on ship shall be taken "as the repaired value and nothing in respect of the damaged "or break-up value of the vessel or wreck shall be taken into "account.

"(8.) Warranted free from any claim consequent on loss of "time whether arising from a peril of the sea or otherwise."

(1) [1897] A. C. 609.

H. L. (E.)
1939
ROBERTSON
v.
PETROS M. NOMIKOS, LD.

Lord Porter.

In addition to the freight policy the respondents were insured by a policy of marine insurance of the same date, which, like the freight policy, was subscribed by the appellant. The second named policy was expressed to be on the hull and machinery of the *Petrakis Nomikos*, valued at 28,000*l.*, against the ordinary marine perils subject to a deductible franchise of 1000*l.* from the aggregate of all particular average claims on each round voyage. This policy, which will be called the " hull policy," contained in type the following clause :—

" In the event of the total or constructive total loss of this " vessel this policy is only to pay its proportion of 14,000*l.*"

To it were attached the Institute Time Clauses—Hulls, of which three also are material—namely, clauses 16, 17 and 18. Their terms are :—

" 16. In no case shall underwriters be liable for unrepaired " damage in addition to a subsequent total loss sustained " during the term covered by this policy.

"17. In ascertaining whether the vessel is a constructive "total loss the insured value shall be taken as the repaired "value, and nothing in respect of the damaged or break-up "value of the vessel or wreck shall be taken into account.

"18. In the event of total or constructive total loss, no "claim to be made by the underwriters for freight, whether "notice of abandonment has been given or not."

While these two policies were in force the respondents chartered the vessel by a charterparty dated September 23, 1936, to a Belgian company to sail to Venezuela or Aruba or Curaçao and there load a cargo of crude oil for various European ports. This charterparty contained a cancelling clause under which the charterers had the option of cancelling should the steamer not be ready to load by November 10, 1936.

On October 18, 1936, the vessel left Havre for Rotterdam in order to undergo certain repairs before starting in ballast on her voyage to South America. On October 31, whilst repairs were being carried out at Rotterdam, an explosion, followed by a fire, occurred in the aft part of the ship, with the result that that part and the cross bunker were completely burnt out.

The vessel was then surveyed and tenders for her repair were asked for. The lowest tender received was 37,400*l.*, and in fact the vessel could not have been repaired for a less sum. The value of tonnage, however, had risen since the hull policy was effected, and the respondents, ascertaining that the repaired value of the ship would be about 45,000*l.*, decided not to abandon her to the hull underwriters or to claim on them for a constructive total loss, but to claim in respect of the cost of repairs for a partial loss.

For a constructive total loss they would have received only 14,000*l.*, since the vessel was uninsured against total loss to the extent of 50 per cent. In a claim for a partial loss they were entitled to recover 27,000*l.*, i.e., 28,000*l.* less the franchise of 1000*l.*, and at an expenditure of 37,400*l.* to repair a ship which would then be worth upwards of 45,000*l.*

The repairs were completed on May 31, 1937, and the respondents have thereafter used the vessel as a freight-earning instrument. But the charterparty, though it was never cancelled, was in fact never performed, and the respondents have received no part of the freight payable thereunder.

In these circumstances the respondents claimed that they were entitled to recover the sum of 4110*l.* under clause 5 of the Institute Time Clauses in the freight policy, and from the appellant his proportion of that sum.

The appellant maintained that the respondents had suffered no loss by a peril insured against, or, at any rate, that the claim was a claim consequent on loss of time and he was therefore exempted from payment by clause 8 of the Institute Time Clauses—Freight. He alleged that there had never been a constructive total loss, but that, even if there had been such a loss, the ship having been repaired, the freight was lost by the time taken for the reparation and not by the constructive total loss of the ship.

The respondents on their part contended that there had been a constructive total loss and that there was no necessity to prove that the loss was caused thereby. The sum insured was, they said, payable in an event, i.e., in the event of the total loss or constructive total loss of the ship so long, at any rate, as that total loss or constructive total loss was caused by a peril insured against; but they contended that if it was necessary to prove that the loss was caused by the total loss or constructive total loss of the ship, it was so caused and not by loss of time.

The learned judge who tried the case in the Court of first instance held that there had been no constructive total loss, inasmuch as the ship had been repaired and not abandoned to underwriters, and that in any case there had been no loss by a peril insured against.

The Court of Appeal reversed the decision of the learned judge, holding that there was a constructive total loss of the ship by a peril insured against and that the insurance was against the happening of that event.

In these circumstances the first question which your Lordships have to decide is whether there was a constructive total loss of the ship within the meaning of clause 5 of the Institute Time Clauses—Freight.

Having regard to the facts and figures agreed upon by the parties, the repairs required would have cost more than the agreed value of the ship inserted in the hull policies. Is this enough? The appellant says, "No." In his contention there can be no constructive total loss unless the ship be abandoned to her underwriters.

Constructive total loss, he says, is defined in s. 60 of the Marine Insurance Act, 1906, and by sub-s. 1 of that section there is a constructive total loss "where the subject-matter "insured is reasonably abandoned on account of its actual "total loss appearing to be unavoidable, or because it could "not be preserved from actual total loss without an expenditure "which would exceed its value when the expenditure had been "incurred." Sub-s. 2, he maintains, only gives particular instances of the general definition in sub-s. 1, and therefore when it says that in particular there is a constructive total loss, "in the case of damage to a ship, where she is so "damaged by a peril insured against, that the cost of "repairing the damage would exceed the value of the ship "when repaired," it means there is a constructive total loss where the ship is reasonably abandoned because the cost of repair would exceed her value when repaired.

That s. 60 is intended to be a complete and not a partial definition appears to follow from the wording of s. 56 when it says: "Any loss other than a total loss, *as "hereinafter defined*, is a partial loss." But it does not follow that the first sub-section lays down the general rule, whereas the second gives certain particular instances already covered by the general rule. Indeed, whatever may be the case with regard to sub-s. 2 (i.), sub-sub-ss. (ii.) and (iii.) do not appear to be covered in terms by the definition in sub-s. 1.

But in any case, unless there is some reason to the contrary, a definition must be held to include the whole of its wording, and if particular instances are given which include matters which are outside the more general definition, that is no reason for supposing that their application is limited by the more general words. They do not merely illustrate—they add to the terms of the definition. Sect. 60 does not confine constructive total loss to cases where the subject-matter of insurance has been abandoned, though in some instances there may be no constructive total loss unless abandonment has taken place.

But even if abandonment be not a condition of a constructive total loss, it is said that in this case there has neither been abandonment or notice of abandonment and the ship has in fact been repaired. In that case, it is argued, under ss. 61 and 62 the loss can only be treated as a partial loss, and consequently there can be no constructive total loss within the meaning of clause 5 of the freight policy.

Sect. 61 no doubt gives the assured an election whether to treat the loss as total or partial, and s. 62 makes it a condition precedent to a claim for a total loss, that notice of abandonment should be given. But in terms, s. 61 contemplates the existence of a constructive total loss even where the loss is treated as partial. It was not contended before us that there could not be a constructive total loss where no notice of

H. L. (E.)
1939
ROBERTSON
v.
PETROS M.
NOMIKOS,
LD.
Lord Porter.

abandonment was given; it was admitted that notice of abandonment was merely a condition precedent to recovery in a case where a constructive total loss had already occurred.

Having regard to the wording of s. 61, abandonment may be a condition or consequence of recovery and not a condition precedent to the existence of a total loss whether actual or constructive. A constructive total loss may exist, but if the assured wishes to take advantage of it he must give notice of abandonment, at any rate in a case where there would be any possibility of benefit to the insurer. If he does give notice and the underwriters accept the abandonment, or if the assured recover as for a total loss, the property insured thereby becomes the property of the underwriters.

If this view be sound, there was a constructive total loss albeit a conventional constructive total loss of the ship by a peril insured against, and undoubtedly the freight to be earned under the charterparty of September 23, 1936, was lost. What then caused the loss of freight? The loss of the ship was constructive, but the loss of freight was actual. If, therefore, there was no provision as to loss of time, the underwriters on freight would be liable: see *Jackson* v. *Union Marine Insurance Co., Ld.* (1); *The Alps* (2); *The Bedouin.* (3)

But there is such a provision contained in clause 8, and it is contended in the present case that the loss of freight was due to loss of time and to that only. The ship, it is said, was in fact repaired and could have carried the cargo had she been repaired in time. Indeed, if the charterers had chosen to wait, or if the repairs could have been effected in a very short time, the cargo would have been carried and the freight earned. How then, it is asked, can it be said that the conventional constructive total loss has caused the loss of freight? It is true that the loss of time caused the loss of the adventure, but such a loss is none the less due to the delay. For this result the appellants rely upon the decisions in *Bensaude* v. *Thames and Mersey Marine Insurance Co., Ld.* (4); *Turnbull,*

(1) (1874) L. R. 10 C. P. 125.
(2) [1893] P. 109.
(3) [1894] P. 1.
(4) [1897] A. C. 609.

Martin & Co. v. *Hull Underwriters' Association, Ld.* (1); and *Russian Bank for Foreign Trade* v. *Excess Insurance Co., Ld.* (2) In all those cases there was a loss of the adventure by which the freight was to have been earned. Nevertheless that loss was held to be due to delay, and was therefore excluded by phraseology identical with or similar to that used in the policy now sued upon.

In none of these cases, however, was there a total or constructive total loss of the ship, and in none did the provisions of clause 5 of the Institute Time Clauses—Freight come under discussion either alone or in relation to its effect on clause 8. The construction of those clauses and their relationship one to the other are, however, vital to the determination of the present case.

Read together it is possible to construe them in either of two ways. They may mean either (1.) "If loss of freight "be caused by loss of time, the underwriters shall not be liable, "unless the vessel is a constructive total loss, in which case "the underwriters will pay in full whether the cause of the loss "of freight be loss of time or not." Or they may mean (2.) "In "no case will the underwriters be liable for loss caused by loss "of time, whether the vessel be a constructive total loss or "not."

For myself I prefer the former of the two constructions, but it is enough to say that the meaning is doubtful, that the proviso as to loss of time is an exception to the general liability of underwriters, and, if they leave their exemption of liability doubtful, they cannot rely upon the exception but must pay the loss.

This is sufficient to dispose of the case, and, accordingly, I desire to reserve the question whether the loss of freight is not rightly to be regarded as caused not by loss of time, but by the constructive total loss of the ship. Some support is lent to this suggestion by the decision in *Roura & Forgas* v. *Townend* (3), a case of freight insurance in which a vessel though originally lost by capture was afterwards restored to

(1) [1900] 2 Q. B. 402.
(2) [1918] 2 K. B. 123.
(3) [1919] 1 K. B. 189.

H. L. (E.)
1939
ROBERTSON
v.
PETROS M. NOMIKOS, LD.
Lord Porter.

her owners, so that in one sense it might be said that the loss of freight was due to the loss of time during which the ship was in the hands of the captors and not to the constructive total loss of the ship by the capture. Yet Roche J. held, and I think rightly, that one must regard the ship as having been lost as soon as it became unlikely that the owners would recover her. She was in fact uninsured and no question of abandonment arose; but had she been insured and notice of abandonment given but not accepted, the right to recover upon the hull policy would have been precluded, not because she was not a constructive total loss, but because she had been restored and the owners who had been indemnified by the restoration could not claim to be indemnified over again. In these circumstances the learned judge held that the underwriters on freight were not protected by the warranty against liability for claim consequent upon loss of time, but were liable because the ship, though afterwards restored, was in fact a constructive total loss.

I desire also to reserve the question raised in argument by the respondents and, I think, adopted by the Court of Appeal, that under the terms of clause 5, provided the freight was in fact lost, the sum insured was payable on the happening of a total loss whether that event caused the loss of freight or not. If, it was said, the ship became an actual or constructive total loss, at any rate in a case where that loss was due to one of the perils insured against, and freight also was lost, the sum insured was payable even though the loss of freight was caused by the bankruptcy of the freighter or some extraneous conditions which prevented loading. Such a construction is, I think, inconsistent with the view expressed by Hamilton J. in *Coker* v. *Bolton* (1), and is not easy to reconcile with the principles of marine insurance.

In *Scottish Marine Insurance Co. of Glasgow* v. *Turner* (2), where there were no provisions such as those to be found in clause 5 and the ship was abandoned but freight was earned, it was held that the assured on freight were unable to recover because freight was in fact earned, and in *McCarthy* v. *Abel* (3),

(1) [1912] 3 K. B. 315.
(2) (1853) 1 Macq. 334.
(3) (1804) 5 East, 388.

it was pointed out by Lord Ellenborough that the loss was not due to a peril of the seas but to the abandonment which was the act of the assured themselves. In *Coker* v. *Bolton* (1), however, and *United Kingdom Mutual Steamship Assurance Association, Ld.* v. *Boulton* (2), the assured recovered owing to the presence of a clause identical with or similar to clause 5 in the present policy. In the latter case Bigham J. held a promise to pay a loss of freight "in the event of the total "loss of the vessel" to mean that the underwriters would pay a loss of freight in circumstances similar to those existing in the *Scottish Marine* case. (3) Such a loss was in his view recoverable not because it was a loss by perils of the seas but because the terms of the policy covered a loss by abandonment.

The learned judge's view if right involves an addition to the perils insured against so as to include amongst them the peril of abandonment, but even such an extension does not go so far as to determine that the mere coincidence of a constructive total loss of the ship with a loss of freight, however caused, is sufficient to enable the assured to recover under the terms of clause 5 of the policy. It is not, however, necessary to come to any final decision upon this point in the present case, and I agree that the appeal should be dismissed.

LORD ATKIN. My Lords, I am asked by my noble and learned friend, Lord Russell of Killowen, to say that he agrees with the two opinions which have been expressed.

Appeal dismissed.

Solicitors for appellant: *Ince, Roscoe, Wilson & Glover.*
Solicitors for respondents: *Holman, Fenwick & Willan.*

(1) [1912] 3 K. B. 315.
(2) (1898) 3 Com. Cas. 330.
(3) 1 Macq. 334.

[HOUSE OF LORDS.]

H. L. (E.)*
1939
March 17, 18;
May 9.

NORTHUMBRIAN SHIPPING COMPANY LIMITED . . . . APPELLANTS;

AND

E. TIMM AND SON, LIMITED. . . . RESPONDENTS.

Shipping—Bill of lading—Shipment from Canadian port—Ship with insufficient bunkers—Loss of ship and cargo—Liability of shipowners—Canadian Water Carriage of Goods Act, 1910 (*R. S. C.*, 1927, *c.* 207).

The respondents were the holders of a bill of lading in respect of a cargo of wheat shipped on the appellants' vessel at Vancouver for carriage to Hull. The bill of lading was subject to the provisions of the Canadian Water Carriage of Goods Act, 1910, which by s. 6 provides that, if the shipowners exercise "due "diligence to make the ship in all respects seaworthy and pro-"perly manned, equipped, and supplied," they shall not be responsible for loss "resulting from faults or errors in navigation " . . . . of the ship." At Vancouver the master was instructed to bunker for the homeward ocean voyage at St. Thomas in the Virgin Islands. On sailing from Vancouver the vessel had not enough coal to take her to St. Thomas, allowing a reasonable margin for the contingencies to which any such voyage must be subject, but she could have bunkered at Colon, a port on the route, the master being authorized to do so if necessary. He, however, did not bunker there, and after leaving Colon, and finding that he had insufficient bunkers to take him to St. Thomas, altered his course to Port Royal; but while making for that port the vessel ran on to a reef off Jamaica and became, along with the cargo, a total loss, the loss being found to be due to faults or errors in navigation. In an action by the respondents claiming for the loss of their cargo:—

Held, that the appellants had failed to exercise due diligence to make the ship in all respects seaworthy on sailing from Vancouver owing to insufficient bunkers, that they were not entitled to rely on the exempting provisions of the Canadian Water Carriage of Goods Act, and consequently were liable for the loss sustained by the respondents.

Decision of Barnes J. in *The Vortigern* [1899] P. 140, 147 considered.

Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal, affirming a decision of MacKinnon L.J., sitting as a judge of first instance.

**Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD PORTER.

The action was brought by the respondents, who were the owners of a cargo of wheat shipped on the appellants' steamship *Newbrough* at Vancouver for carriage to Hull, and indorsees of the bill of lading issued by the appellants in respect of the cargo. The respondents' claim was for damages for non-delivery of the cargo, which was totally lost on the voyage through the stranding of the *Newbrough* on a reef in the Caribbean Sea, south of Jamaica.

The contract under which the cargo was shipped and carried was contained in a bill of lading which by cl. 35 provided that " this bill of lading is subject to all the terms "and provisions and exemptions from liability contained in "the Act of Parliament of Canada, 9 & 10 Edward 7, c. 61," the material words in that Act being as follows : " If the "owner of any ship transporting merchandise . . . . from "any port in Canada exercises due diligence to make the "ship in all respects seaworthy and properly . . . . supplied, "neither the ship nor the owner . . . . shall become or be "held responsible for loss . . . . resulting from faults or "errors in navigation . . . . of the ship. . . . ."

At Vancouver, the port of shipment, the master of the *Newbrough* was instructed by his owners to bunker for the ocean voyage homewards at St. Thomas, in the Virgin Islands. When she left Vancouver, the *Newbrough* had on board no more than 675 tons of coal, which, as MacKinnon L.J. found, was not sufficient to take her to St. Thomas, and in the judge's opinion the master should have taken more bunkers at Colon, the port at the Atlantic end of the Panama Canal, where there were bunkering facilities, before proceeding to St. Thomas, the master having authority from his owners to bunker there if he considered it necessary. The master did not, however, bunker there, but a day or two after leaving Colon, finding that he had not enough bunkers to take him to St. Thomas, which was about 530 miles away, he altered his course to Port Royal, about 415 miles distant ; but while on this course the vessel ran on to Morant Cap, a reef off Jamaica, and became, along with her cargo, a total loss.

MacKinnon L.J. held that the stranding of the *Newbrough*

H. L. (E.)
1939
NORTHUMBRIAN SHIPPING CO.
v.
E. TIMM & SON, LD.

was due to the negligence of the master and navigating officers, and that the appellants could not rely on the exemption from liability in s. 6 of the Canadian Water Carriage of Goods Act, 1910, inasmuch as they had failed to exercise due diligence in sending the ship from Vancouver with insufficient coal for the bunkering stage which they had fixed at St. Thomas. He accordingly gave judgment for the plaintiffs, the present respondents.

The Court of Appeal (Greer, Slesser and Clauson L.JJ.) affirmed the decision of MacKinnon L.J. The defendants appealed.

H. U. Willink K.C. and *Cyril Miller* for the appellants. It is an implied term of the contract in such a case that the shipowner shall be deemed to comply with the warranty of seaworthiness if he fixes reasonable and usual stages for bunkering purposes, and the ship is seaworthy quoad bunkerage at the beginning of each stage; and, where the steamer is seaworthy for the stage so fixed but the master omits to have the bunkers refilled, that does not constitute a breach of the warranty of seaworthiness, but is an act of negligence falling within the words of s. 6 of the Canadian Water Carriage of Goods Act, "loss . . . . resulting from faults or errors in navigation " . . . . of the ship." In fixing the margin for contingencies in the matter of bunkering the master is no doubt bound to take into account the possibility of bad weather or other adverse conditions; but, on the other hand, he is entitled to take into account, where his contract gives him liberty to call at intermediate ports, the existence of bunkering facilities which may be available. The fact that in this case the engineer went past Colon without filling up the bunkers cannot be considered as a breach of warranty of seaworthiness. This point was not touched in *Thin* v. *Richards & Co.* (1) or in *The Vortigern.* (2)

[They also cited *Greenock Steamship Co.* v. *Maritime Insurance Co.* (3)]

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(1) [1892] 2 Q. B. 141.
(2) [1899] P. 140.
(3) [1903] 1 K. B. 367; [1903] 2 K. B. 657.

A. T. Miller K.C., *Sir Robert Aske K.C.*, and *A. J. Hodgson* for the respondents were not called upon.

The House took time for consideration.

1939. May 9. LORD ATKIN. My Lords, I have had the opportunity of reading the opinions which are about to be delivered by my noble and learned friends Lord Wright and Lord Porter. I agree with them, and I have nothing to add.

LORD THANKERTON. My Lords, I also have had an opportunity of considering the opinions about to be delivered by my two noble and learned friends and I concur in their view.

LORD WRIGHT. My Lords, the material facts in this case were carefully and precisely found by MacKinnon L.J., who tried the action when sitting as an additional judge of the King's Bench Division. His findings of fact were affirmed by the Court of Appeal, and have been accepted before your Lordships on this appeal. They can therefore be stated shortly.

The respondents were holders of a bill of lading for a parcel of 9520 bushels of wheat shipped in November, 1932, at Vancouver, British Columbia, on the appellants' steamship *Newbrough* for carriage to Hull. The vessel's total cargo consisted of 8389 tons of wheat and bran. In the events which ensued that whole cargo, which was worth about 40,000*l.*, became a total loss. It has been agreed that the result of these proceedings will be binding as between the shipowners and the other bill of lading holders. The *Newbrough* had sailed round from Montreal to Vancouver in ballast, and the appellants had instructed the master to bunker on the way at Port Royal, Jamaica, taking in sufficient coals to sail with 1200 tons. This was done. At Vancouver the master was instructed to bunker for the ocean voyage homewards at St. Thomas, in the Virgin Islands. This, as MacKinnon L.J. found, fixed the stage of the voyage for bunkering purposes.

At the trial the Lord Justice found, after considering a great deal of conflicting evidence, that when she left Vancouver, on November 26, 1932, she had on board no more than 675 tons of coal, and that this quantity was not sufficient to take her from Vancouver to St. Thomas. Her voyage took her down the Pacific coast and then through the Panama Canal. There was nothing abnormal in the weather in the Pacific for a winter voyage. While passing through the Canal, the master asked the chief engineer what quantity of coal remained on board, and was told there was about 168 tons. This appears to have been an over-estimate of about twelve tons. But it is not now contested that, as the Lord Justice found, the master should have taken more bunkers at Colon, the port at the Atlantic end of the Canal, where there are bunkering facilities, before proceeding towards St. Thomas. It is not questioned that he had authority from his owners to do so if he deemed it necessary. He did not do so, and left the Canal on December 19, 1932. On December 22 he decided that he had not enough bunkers to take him to St. Thomas, which was about 530 miles away, and altered course to Port Royal, then about 415 miles away. There had been no unusual weather for the time of the year in the Caribbean Sea. While on this course the vessel ran on to Morant Cap, a reef off the island of Jamaica, and became, along with her cargo, a total loss. MacKinnon L.J. found that the vessel was lost by default or errors in navigation. He also found that on starting from Vancouver the vessel had not enough coal to take her to St. Thomas, allowing a reasonable margin for the contingencies to which any such voyage must be subject, and the master had not exercised due diligence to make her seaworthy.

The bill of lading under which the respondents' wheat was carried was issued at Vancouver on November 26, 1932. It was to be governed by the law of the carrying ship, that is by English law, and contained elaborate stipulations and exceptions, but these were in the main superseded by cl. 35. This clause, which is generally called the Clause Paramount, provided that the bill of lading was subject to all the terms

H. L. (E.)
1939
NORTHUMBRIAN SHIPPING CO.
v.
E. TIMM & SON, LD.
Lord Wright.

and provisions of, and exemptions from liability contained in, the Canadian Water Carriage of Goods Act, 1910, which was then in force, and incorporated, as required by that Act, s. 4, which declared to be null and void any clause, covenant or agreement in any bill of lading relieving the shipowner, charterer, master or agent from liability for damage arising from negligence or weakening or avoiding the obligations of the owner or charterer to exercise due diligence in regard to seaworthiness or the obligations of the master, officers, servants or agents to care for and deliver the goods, unless such clause, covenant or agreement was in accordance with the Act. In this way, as matter of contract, the relevant exceptions contained in the Act were incorporated in the bill of lading. Of these provisions, those in s. 6 were the only ones relied on by the appellants. This section, so far as material, is to the effect that, if the owners of any ship transporting merchandise from any port in Canada should exercise due diligence to make the ship in all respects seaworthy and properly supplied, the owner should not be responsible for loss resulting from faults or errors in navigation of the ship. The appellants rightly, for obvious reasons, did not seek to found a defence on s. 7. Sect. 6 was considered by the Privy Council in *Paterson Steamships, Ld.* v. *Canadian Co-operative Wheat Producers, Ld.* (1), where it was said (2): " What is important to note in s. 6 "is that the protection is conditional on the owner having "exercised due diligence to make the ship seaworthy. At "common law, seaworthiness of the ship in a contract of "sea carriage has, if necessary, to be shown to have existed "at the commencement of the voyage, but unseaworthiness "involves no liability on the shipowner unless it has caused the "damage complained of: *J. & E. Kish* v. *Charles Taylor, Sons "& Co.* (3); but the obligation to provide a seaworthy "ship is absolute, and is not limited to due diligence to make it "so. The matter which s. 6 deals with as the condition on "which its privileges may be relied on is not seaworthiness, "but due diligence to make the ship seaworthy: if, however,

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(1) [1934] A. C. 538.
(2) Ibid. 546.
(3) [1912] A. C. 604.

H. L. (E.)
1939
NORTHUMBRIAN SHIPPING CO. v. E. TIMM & SON, LD.
Lord Wright.

"that condition is not fulfilled, the shipowner cannot, under "s. 6, excuse himself from liability for loss due to negligence "in the respects specified in the section."

In the present case, as already stated, at the trial MacKinnon L.J. held that the stranding of the *Newbrough* on the Morant Cap was caused by the negligence of the master and the navigating officers, and thus resulted from faults or errors in navigation. Whether the appellants could successfully rely on s. 6 depended on whether they could show that they exercised due diligence to make the vessel seaworthy and thus fulfilled the condition imposed by the section. This issue turned solely on the sufficiency of the bunkers on leaving Vancouver. As already stated, MacKinnon L.J. held that they had not fulfilled the condition. The obligation to make a ship seaworthy is personal to the owners, whether or not they entrust the performance of that obligation to experts, servants, or agents. They cannot say that there was a miscalculation merely due to the negligence of their servants. They were in this case responsible for deciding that the vessel should bunker at St. Thomas on her way from Vancouver, and were bound to see that she had sufficient coal. Prima facie, the findings of fact of MacKinnon L.J. would seem to dispose of the case. But there has been raised on behalf of the appellants a more subtle contention, involving a refinement on the doctrine of stages of the voyage as applied in regard to bunkering on a long voyage. This doctrine of stages has not been the subject of direct decision in this House, but has been laid down or recognized by the Court of Appeal in *Thin* v. *Richards & Co.* (1); *The Vortigern* (2); *McIver & Co., Ld.* v. *Tate Steamers, Ld.* (3); and also in *Greenock Steamship Co.* v. *Maritime Insurance Co., Ld.* (4), where the rule was applied in the case of a voyage policy of marine insurance. It is a special application, to bunker supply, of a doctrine which has been applied in other connections, such as a stage of the voyage for loading in port, or for passages in inland waters, where different standards of fitness are

(1) [1892] 2 Q. B. 141.
(2) [1899] P. 140.
(3) [1903] 1 K. B. 362.
(4) [1903] 2 K. B. 657.

required as compared with what is required in the open sea. The application of the doctrine of stages became particularly important when vessels came to depend for their propulsion on machinery, the fuel for which was necessarily consumed as the voyage went on. The rule which has been established is that a steamship or motor vessel starting from her port on a long ocean voyage need not carry enough coal (or oil or other fuel) for the whole voyage, but only sufficient to take her to a particular convenient or usual bunkering port on the way. That is treated as a section of the voyage and is called a stage of the voyage. Thus the warranty of seaworthiness is sub-divided in respect of bunkers. Instead of a single obligation to make the vessel seaworthy in this respect, which must be satisfied once for all at the commencement of the voyage, there is substituted a recurring obligation at each bunkering port at which the owners or those who act for the owners decide she shall bunker, thereby fixing the particular stage of the voyage. The principle presupposes that the contract of affreightment permits of this course and of deviating if necessary for this purpose. It has been said that this rule is a concession to the shipowners. But I prefer to say, with Collins L.J. in *The Vortigern* (1), that it is rather an adjustment of the requirements as to this type of seaworthiness to the commercial necessities of the case. If a steamship starting, for instance, from London for Australia had to start with enough coal or fuel to carry her to Australia, the amount she would have to carry on starting would reduce her cargo-carrying capacity to such an extent as to make the adventure uneconomic. Not only would the shipowners suffer, but so would the shippers and the community generally, because of the high or prohibitive freights which would have to be charged.

But, as usually understood, the doctrine of stages would not in this case help the shipowners, on the Lord Justice's finding that there was a failure of due diligence in sending the ship from Vancouver with insufficient coal for the bunkering stage which they had fixed at St. Thomas. The refinement which

(1) [1899] P. 140, 159.

H. L. (E.)
1939
NORTHUMBRIAN SHIPPING CO.
v.
E. TIMM & SON, LD.
Lord Wright.

the appellants seek to introduce depends on a proposition of law which the Lord Justice and the Court of Appeal have rejected. This is, that though a steamer has not in fact a sufficient margin of bunkers to satisfy the normal contingencies of the stage which the owners have fixed, yet, if a reasonably sufficient margin has been allowed for, the fact that there turns out to be an actual deficiency will not necessitate a finding that the vessel was unseaworthy for the stage, or that due diligence has not been used to make her so, provided that there is in the course of the stage an intermediate bunkering port at which in case of need the vessel can call. The quantity of bunkers, which apart from this qualification would be necessary for the stage, is then, it is said, to be modified by taking into account this optional facility. Thus, it is argued, the vessel starts in a seaworthy condition in respect of bunkers, and if she is likely to run short on the way, because of conditions of the voyage rather worse than anticipated, though not abnormal, she can make good the defect by calling at the intermediate bunkering port. If she fails to do so, the failure is not, it is said, a breach of the warranty of seaworthiness which has been satisfied once for all for that stage when she started upon it, but is merely a fault or error in navigation for which the owners can claim the protection of s. 6 of the Act, or of similar exception clauses under other forms of contract. As to the facts of this particular case, the appellants point out that the *Newbrough* on a previous winter voyage from Vancouver to St. Thomas had consumed 602 tons of coal, which was substantially less than what the Lord Justice found she had when she started from Vancouver on this voyage; and also that the failure to take more coal at Colon was due to the miscalculation of the engineer, who gave the master a wrong figure when the master on the passage through the Canal inquired what coal was left in the bunkers, and all this constituted a case of negligence, not unseaworthiness. The appellants alleged that having regard to the possibility of bunkering at Colon, the *Newbrough* should be held as a matter of law to have been sufficiently supplied with bunkers when she left Vancouver, or at least that due diligence had been exercised to make her so. In support of this view of the law they relied on the language of Gorell Barnes J. in *The Vortigern.* (1) In that case the *Vortigern* was on a voyage from Cebu to Liverpool. The first stage of the voyage was to Colombo, where she coaled. The next coaling port fixed by the owners was Suez. She ran short of coal in the Red Sea. In proceeding down the Red Sea she passed Perim and Aden and might have put into either port to coal, but she did not. Barnes J. held that she was unseaworthy on leaving Colombo because she had not sufficient coal for the stage to Suez, and held, that it was immaterial to consider what happened afterwards when she passed Perim. But the judge went on to say that if it were not a breach of warranty for the vessel to start with insufficient coal to reach the next port at which she was intended to coal, provided there were another coaling port which she would pass on the way and could have in reserve to go into if necessary, then, as the owners "must treat the voyage as divided into two stages "from Colombo to Port Said instead of one," the vessel must be made seaworthy on leaving Perim. " The vessel must "be seaworthy for the whole stage, or made seaworthy "for each division of the stage, and she was not seaworthy for "the portion of the voyage on which the loss occurred." Thus there is a dilemma. To apply this reasoning to the facts of the present case, either the stage was from Vancouver to St. Thomas, in which event the steamer was not seaworthy on leaving Vancouver, or the stage was from Vancouver to Colon, in which case the new stage started from Colon and was to St. Thomas from Colon, and the steamer was not seaworthy on that stage. The dilemma thus appears to be unavoidable.

Barnes J. in *The Vortigern* (1), said that he preferred the former alternative, and added: "If the captain determines to "start, as in this case, from Colombo to Suez, that is the stage "which was fixed upon, and if the vessel has not enough coal "for that stage I do not think the owners are relieved from the

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(1) [1899] P. 140, 147.

"obligation thus incurred by setting up negligence in not putting "into a port on the way to get coal if they are found to fall "short in the transit from Colombo to Suez."

These observations by a great master of mercantile law meet with my complete assent, and may be applied with even greater force in the present case. It is true that under s. 6 of the Canadian Act the question is not whether the unseaworthiness caused the loss, as it was in *The Vortigern.* (1) There is no question here of the absolute warranty of seaworthiness. It is a question of the more limited obligation of due diligence. But the condition of claiming the exemption depended on establishing that due diligence had been exercised to make the ship seaworthy. I do not see how due diligence can be exercised if it is uncertain what is to be the next coaling port. There may be several alternative or optional possible coaling ports on the way, and I do not see how there can be a standard of what is a sufficient bunker supply, unless it is determined what is the stage of the voyage. This must be done before sailing, because it is then that the obligation, whether it is the absolute obligation, or the obligation of due diligence, must be satisfied.

I can find no suggestion that the master ever contemplated that he was sailing from Vancouver on any stage of the voyage except to St. Thomas, which was the next coaling port fixed by the owners. It is true that the master had authority, if coal were proving insufficient, to replenish the bunkers at Colon, as he thought of doing when in the Canal. But in my opinion the stage must be determined when the vessel sails. Seaworthiness is no doubt relative to the nature of the adventure and the other circumstances of the case. But, unless it is determined on sailing what the stage of the voyage is, it is impossible to say whether the ship is seaworthy or not. This might have serious consequences on the insurances. There is also the special difficulty under s. 6 that a vessel might be lost by negligent navigation soon after sailing from her first port with insufficient bunkers. Like Barnes J. I prefer what he called the former alternative, that is, that the intention

(1) [1899] P. 140, 147.

on sailing definitely fixes the stage and that the availability en route of what might be called an optional bunkering port cannot be taken into account. I think that this is true not only in general but also where it may be said that it is only a question of estimating the margin for contingencies. If the stage is determined, the quantity of bunkers sufficient to make the vessel seaworthy for that stage must be determined in view of all contingencies that a prudent shipowner ought to contemplate.

The appellants' argument seems to be that the bunkers are to be deemed to be sufficient for the stage if, though in fact insufficient, they might have appeared to be reasonably sufficient having regard to reasonable contingencies; if, however, the estimate is not adequate and the margin proves in fact insufficient, the vessel is still to be held seaworthy for the stage, because she can fill up on the way. I find such a view most difficult. The way of looking at the matter in this connection most favourable to the shipowners is that there may be what may be called a conditional seaworthiness. Though the bunkers are insufficient for the stage, as MacKinnon L.J. held that they were in this case, yet they become sufficient when the condition is fulfilled and they are replenished at the intermediate coaling station before harm can ensue. If the condition is fulfilled, seaworthiness, it is said, is actually, or, at least, retrospectively secured. But if in the case supposed the vessel is lost by negligent navigation soon after leaving the first port, and the Court finds that she was not sufficiently bunkered for the stage, whether because there was an insufficient margin for contingencies or for any other reason, how can it be said that the defect was immaterial simply because she might have bunkered at the intermediate port and made good the initial deficiency? It is, however, not necessary here to consider these questions because the vessel did not in fact take coal at Colon, so that, if it be right to talk of a conditional seaworthiness, the condition was not fulfilled and the original unseaworthiness was unadeemed. It is not here necessary finally either to reject or accept the view that Barnes J. mentioned, but did not prefer, and which the

Court of Appeal in *The Vortigern* (1) did not even mention, because on either view the appellants must fail here, as MacKinnon L.J. and the Court of Appeal unanimously held. If they have to rely on conditional seaworthiness the condition was not fulfilled.

I merely add a few words out of respect to an argument addressed on behalf of the appellants that to reject their contention, which as at present advised I am prepared to do, would be unduly to burden shipowners, who would be held bound to fulfil excessive requirements in the way of bunkers. Commercial law has always been ready, so far as possible, to sacrifice pedantic logical consistency in favour of the convenience in the conduct of business. But I am not pressed by the suggested hardship or embarrassment. Owners, with the help of their masters and other agents acting for them, have full discretion to fix any reasonable stages for the voyage. It would involve grave difficulties in practice if the stage of the voyage were not definitely fixed on sailing so that the standard of what was sufficiency in respect of bunkers was rendered vague and uncertain.

In my opinion, the appeal should be dismissed with costs.

LORD PORTER. My Lords, the appellants are the owners of the steamship *Newbrough* and the respondents are the indorsees of certain bills of lading issued by the appellants in respect of a parcel of Canadian wheat, part of a cargo which she carried.

The action was brought by the respondents for non-delivery of the parcel which was totally lost through the stranding of the *Newbrough* on Morant Cap, a reef in the Caribbean Sea, south of Jamaica.

She had sailed on a voyage from Swansea to Montreal, and the captain was there instructed by the appellants to proceed to Vancouver in ballast and to bunker en route at Port Royal, taking in sufficient coal at that port to sail with 1200 tons.

After coaling as directed, the *Newbrough* cleared for Vancouver and arrived there on November 24, 1932. At

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(1) [1899] P. 140.

Vancouver she shipped a cargo of Canadian wheat and set out on her return voyage to Hull, without having taken on board any further bunkers. Before sailing, however, the captain was instructed by the appellants to replenish his coal at St. Thomas in the Virgin Islands on the homeward voyage.

He had, according to his own account, also received authority to call at Colon if necessary and to coal there.

The cargo was carried under bills of lading signed by the master containing a large number of provisions of which only two need be mentioned. The first is cl. 2, which may be sufficiently described by saying that it gives a wide permission to deviate. The second is cl. 35, which provides: "This "bill of lading is subject to all the terms and provisions of "and exemptions from liability contained in the Act of "Parliament of Canada, 9–10 Edward VII., chapter 61, "and the following section is incorporated in this bill of lading "as required by the said Act.

"Where any bill of lading or similar document of title to "goods contains any clause, covenant or agreement whereby, "(*a*) The owner, charterer, master or agent of any ship, or "the ship itself, is relieved from liability for loss or damage "to goods arising from negligence, fault, or failure in the "proper loading, stowage, custody, care or delivery of goods "received by them or any of them to be carried in or by the "ship; or (*b*) Any obligations of the owner or charterer of any "ship to exercise due diligence to properly man, equip, and "supply the ship, and make and keep the ship seaworthy, "and make and keep the ship's hold, refrigerating and cool "chambers, and all other parts of the ship in which goods are "carried, fit and safe for their reception, carriage and "preservation, are in any wise lessened, weakened or avoided; "or (*c*) The obligations of the master, officers, agents or "servants of any ship to carefully handle and stow goods, "and to care for, preserve and properly deliver them, are "in any wise lessened, weakened or avoided, such clause, "covenant or agreement shall be illegal, null and void, and of "no effect, unless such clause, covenant or agreement is in "accordance with the other provisions of this Act."

H. L. (E.)
1939
NORTHUMBRIAN SHIPPING CO.
v.
E. TIMM & SON, LD.
Lord Porter.

Sect. 6 of the Canadian Act referred to—omitting immaterial words—runs as follows : " If the owner of any ship transporting "merchandise from any port in Canada exercises due diligence "to make the ship in all respects seaworthy, and properly "manned, equipped and supplied, neither the ship nor the "owner . . . . shall become or be held responsible for loss "resulting from faults or errors in the navigation . . . . "of the ship. . . . ."

It was found by the Court of first instance, and admitted in argument before us, that the cargo was lost owing to the stranding of the ship, and that that stranding was due to the negligent navigation of her master.

If then the owners had exercised due diligence to make the ship seaworthy, they would be excused for a loss suffered owing to the negligence of her officers, but in order to claim that protection they must show that the condition of seaworthiness was fulfilled : see *Paterson Steamships, Ld.* v. *Canadian Co-operative Wheat Producers, Ld.* (1) The question argued in the Courts below, and before your Lordships, was whether that condition had in fact been complied with.

Prima facie a ship must be seaworthy on sailing from her starting-point for the whole voyage upon which she is engaged, but it has long been established that the voyage may be divided into stages, and that it is sufficient if she be satisfactorily equipped for each stage at its commencement. The principle is older than the age of steam. It has been held to apply to such stages as lying in harbour : *McFadden* v. *Blue Star Line* (2); proceeding down a river : *Bouillon* v. *Lupton* (3) ; and passing from one port to another : *Biccard* v. *Shepherd.* (4)

The doctrine was, however, of less importance in the days when vessels proceeded under sail. Once steam propulsion was adopted and bunkers had to be carried, it became important for the shipowner that he should not be compelled to carry so large a quantity of bunkers as to compel him unduly to diminish his cargo or should even force him to avoid

(1) [1934] A. C. 538, 548.
(2) [1905] 1 K. B. 697.
(3) (1863) 33 L. J. (C. P.) 37.
(4) (1861) 14 Moo. P. C. 471.

certain voyages altogether. Indeed, it is true to say that the principle had also some importance for the cargo owner, since by it more cargo could be carried and freight cheapened.

Whatever its origin, the doctrine of stages is now well established, and it is immaterial to consider whether it is a concession granted to the shipowner or a provision for the mutual advantage of the carrier and cargo owner.

But though the voyage may be divided into stages and the obligation of the shipowner confined to providing the proper equipment for each of those stages at its beginning, the force of the obligation has not been diminished. It may well be that the shipowner has the right to predetermine what those stages shall be, at any rate provided he chooses usual and reasonable stages. Once chosen, however, they are those for which the necessary equipment must be furnished.

It was conceded on behalf of the appellants that if the voyage from Vancouver to St. Thomas were alone to be considered, and if the possibility of coaling at other ports on that stage were excluded, the *Newbrough* had insufficient coal in the sense that no sufficient margin for possible contingencies had been shipped. It is indeed possible that on the figures found by the learned judge she was insufficiently equipped for that stage even though the possibility of coaling at an intermediate port were taken into consideration; but your Lordships have not considered the evidence on that part of the case, and for the purpose of this decision I accept the view that in the latter case a sufficient margin of coal had been shipped.

It was, however, contended on behalf of the appellants that in equipping a vessel for a stage between two ports where it is possible to call and take in bunkers at an intermediate port, the same margin of safety is not required as in a case in which a ship sails from one port to another with no possibility of coaling in between. In either case the appellants agreed that the sole question for the Court to consider was whether at the beginning of the stage the ship had sufficient bunkers on board for a voyage between the two ports; but, it was said, that sufficiency must be measured by a different standard in a case where she could replenish her fuel in the course of the stage from that required where such replenishment was impossible.

In argument the proposition was stated thus: "The "quantity is reasonably sufficient if it consists of the quantity "reasonably anticipated as the quantity that will be used, "plus a reasonable margin for contingencies. In fixing the "margin for contingencies, however, the shipowner is bound "to take into account any weather or other adverse conditions "with which in the ordinary course he may meet, but is "entitled also to take into account, at any rate where his contract "gives him liberty to call at intermediate ports, the existence "of bunker facilities en route which will be available in the "event of adverse conditions reducing his margin to an "unsatisfactory level."

In the present case, as I have indicated, there was a wide deviation clause, and liberty was thereby given to call at intermediate ports, amongst which Colon would be included. The question, therefore, can be narrowed to an inquiry whether the obligation as to the amount of the bunkers required for a stage differs according to whether there are opportunities of bunkering at a usual coaling port on the route, or whether there are no such opportunities because the stage is one where no such coaling port exists.

In the present case the owners of the *Newbrough* chose as their first stage on the homeward voyage that from Vancouver to St. Thomas. It was imperative, therefore, that she should be seaworthy at Vancouver, the beginning of the stage.

But seaworthiness is a term of art and means, in relation to bunkering, as indeed the wording of the Canadian Act shows, that the ship must have a sufficient supply of coal, including a proper margin for contingencies, to take her over the whole of her route between the ports constituting that stage. If that be the obligation, the *Newbrough* was admittedly insufficiently supplied. Indeed, to assert otherwise is merely to say that, though she had not enough to cover all necessary contingencies for the stage, yet she had enough for the more usual eventualities and an opportunity of making up her deficiencies en route in case the less usual but still not improbable contingencies should occur. It may be that the owners in taking the lesser quantity were running no more than a reasonable risk in a case where the coal supplied might well prove sufficient and, if it did not, their master could take a further supply at an intermediate port; but the question is not whether a reasonable risk has been taken, but whether the owners have exercised due diligence to make their ship in all respects seaworthy and properly supplied. Their duty is to use due diligence to supply the ship with coal, and that duty is not performed by providing what may prove to be insufficient unless the master takes an additional quantity at some intermediate port in case of need. They may have supplied sufficient bunkers if all goes well—if not, they have delegated to their master a duty which the law imposes upon them, and must trust to him to perform it. If he does not, they are answerable for the breach of an obligation which it was their duty to fulfil.

The argument involves the proposition, as indeed the appellants recognized, that a failure of the master to make good the deficiency would not make the ship unseaworthy but would only be an instance of negligence on the part of her officers. But to accept such a contention would indeed be to decrease the liabilities of a shipowner by excusing him for a failure to perform his obligations on the ground that he had entrusted them to his servants and those servants had been negligent. If the argument were to prevail, I see no reason why a shipowner should not claim that, though his ship had insufficient bunkers at the beginning of a voyage or a stage, yet he had done all that was necessary, since he had instructed his master to take an ample supply of bunkers on sailing and had supplied him with enough money to pay for them.

On the other hand, to maintain that the ship was or was not seaworthy according to whether the master bunkered or failed to bunker en route would involve the possibility of her becoming unseaworthy at some place on the voyage, and at a time which it would be difficult to define. Would it be when the master determined to take no more coal, or when he reached and passed the intermediate port without calling, or must one regard the ship as unseaworthy from the beginning of the stage? And with this doubt in mind how is it to be known when her insurances became ineffective or when the protection afforded by the terms of her bills of lading ceased to operate?

If the moment when she might have coaled at the latest available intermediate port be taken, she would become unseaworthy as from a port at which she did not bunker and at which she might not even have called.

Such a state of things was no doubt envisaged by Gorell Barnes J. in *The Vortigern* (1), but he preferred to rest his decision on the ground that the vessel was unseaworthy from the beginning of the stage. Moreover, even if the contention were to be adopted, it would not avail the appellants in the present case, since, if Colon is to be regarded as the beginning of a stage, she was conceded to be unseaworthy then. Indeed, the argument on behalf of the appellants recognized and maintained that the vessel's seaworthiness must not be judged by the amount of bunkers she had at Colon.

In whatever way, however, one looks at the circumstances, the appellants seem to be placed in a dilemma.

If the master elects not to avail himself of the intermediate port, he but confirms the stage which the owners had previously arranged, and, if at the beginning of that stage the ship was unseaworthy, she remained unseaworthy until she reached or failed to reach the appointed port. If, on the other hand, he does avail himself of the opportunity of bunkering at the intermediate port, he elects to make that part of the voyage in two stages, and the vessel must be seaworthy when she leaves the intermediate port. It is not enough to say that a prudent man would proceed on the longer stage trusting to fill up with bunkers at an intermediate port if necessary. No doubt the opportunity of replenishing her bunkers exists, but a failure to perform the warranty of seaworthiness cannot be excused by trusting to the discretion of the master, and if he fails to act prudently by laying the blame on him. The

(1) [1899] P. 140, 147.

fact that it was negligence in the captain or some other officer of the ship not to elect to call at the intermediate port will not make the ship seaworthy at the beginning of her voyage.

This view accords with that expressed in *Thin* v. *Richards* (1); *The Vortigern* (2); and *Greenock Steamship Co.* v. *Maritime Insurance Co.* (3)

With these cases I agree, and I do not find it necessary—as Gorell Barnes J. did not find it necessary in *The Vortigern* (2)—to determine whether any consideration of seaworthiness at the intermediate port was material or not.

The *Newbrough* was not seaworthy when she started on that stage of her voyage which lay between Vancouver and St. Thomas, and due diligence was not exercised to make her so.

I would dismiss the appeal.

LORD ATKIN. My Lords, I am asked by my noble and learned friend Lord Russell of Killowen to say that he agrees with the opinions which have been expressed.

Appeal dismissed.

Solicitors for appellants: *Middleton, Lewis & Clarke.*
Solicitors for respondents: *Clyde & Co.*

(1) [1892] 2 Q. B. 141.
(2) [1899] P. 140.
(3) [1903] 1 K. B. 367; [1903] 2 K. B. 657.

[HOUSE OF LORDS.]

PRATT . . . . APPELLANT; H. L. (E.)*

AND

1939

PRATT . . . . RESPONDENT. *May* 18; *June* 29.

Divorce — Desertion — " Without cause " — Termination — Request by deserting spouse for interview to discuss resumption of cohabitation — Refusal by innocent spouse — Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.

The respondent deserted her husband in August, 1934. In September, 1936, she wrote to him twice asking him, in each letter, to see her with a view to discussing a resumption of cohabitation. He refused to do so, saying that an interview would serve no useful purpose :—

Held, that, after this refusal by the husband, the respondent could not be said to continue to desert him " without cause " within the meaning of s. 2 of the Matrimonial Causes Act, 1937.

Decision of the Court of Appeal [1939] P. 117 affirmed.

APPEAL from a decision of the Court of Appeal (1) affirming a decision of Finlay J.

The petitioner, Francis James Ellis Pratt, and the respondent, Eileen Mary Drummond, were married on September 14, 1933. On August 11, 1934, the respondent left her husband in circumstances which amounted to desertion of him by her, and after that date the parties lived apart.

On September 23, 1936, the respondent wrote to her husband a letter in which she said: " I am writing to say "that I should like to see you and am thinking about coming "over one day next week. Which day suits you best? I "suppose Wednesday? Do not imagine I am coming in a "hostile spirit. I wish to meet you perfectly agreeably and "I trust you will do the same. I wish to have a talk with "you, but I am anxious for it to be a perfectly pleasant one. ". . . . I have a nice house here and lovely garden, and you

(1) [1939] P. 117.

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* *Present:* LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

"are always quite welcome if you care to come." On September 24 the husband wrote: "I am in receipt of your "letter of the 23rd inst. . . . . I do not think an interview "will serve any useful purpose."

On September 25 the respondent wrote a further letter, in which she said: "I am feeling that, as we are still married, "it will be best if we can come together, as it is undoubtedly "the only course. My idea in coming to see you was to "discuss this and suggest that we should meet occasionally "and go out together, in short, make a new start, with a "view to making a home together in the future. I should "like you to come and see me, and have no wish for further "hostilities or bitterness, which do neither of us any good. "Therefore I am sure you will see that it is essential we meet "and that the future shall be arranged between us as agreeably "as possible. Anything you have to say as regards this, or "suggestions you may make, I shall be pleased to consider. "Any day or time, bar Tuesday, will suit me next week." On September 27 the husband replied: "I can only repeat "what I said in my letter to you of the 24th inst., namely, "that I do NOT consider an interview would serve any useful "purpose."

On January 1, 1938, the husband filed a petition for the dissolution of the marriage under s. 2 of the Matrimonial Causes Act, 1937 (1), on the ground that his wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition.

The petition, which was undefended, came on at Winchester Assizes before Finlay J., who held that, from the moment when the husband refused to meet the wife and discuss a resumption of cohabitation, the wife could not be said to desert him "without cause" within the meaning of the section, and he accordingly dismissed the petition.

(1) Matrimonial Causes Act, 1937, s. 2: "A petition for divorce "may be presented to the High "Court . . . . either by the "husband or the wife on the "ground that the respondent— ". . . . (b) has deserted the "petitioner without cause for a "period of a least three years "immediately preceding the presentation of the petition; . . . ."

H. L. (E.)
1939
PRATT
v.
PRATT.

The husband appealed to the Court of Appeal, and that Court took the same view as Finlay J. and therefore dismissed the appeal.

The husband now appealed to this House.

Noel Middleton K.C. and *J. T. Molony* for the appellant. For one spouse to withdraw from the consortium is an offence, and it is for that spouse to purge it by returning to cohabitation. In *Harris* v. *Harris* (1) it was decided that the Court must be satisfied that an offer by the deserting spouse is a genuine offer. Desertion is a continuing offence, and cannot be obliterated by an offer to return where the other party reasonably entertains doubts of its genuineness: *Thomas* v. *Thomas*. (2) Referring to that case Scrutton L.J. said in the later case of *Bowron* v. *Bowron* (3) that the offence is not wiped out until the offending spouse " shows a genuine and "satisfactory repentance." Here such repentance has not been shown. In *Thurston* v. *Thurston* (4) it was held that intermittent visits did not constitute a return to cohabitation, and we submit that still less can a letter offering to treat be considered as a purging of the offence.

The respondent did not appear, nor was she represented.

The House took time for consideration.

June 29. LORD MACMILLAN. My Lords, I am authorized by my noble and learned friend Lord Thankerton to say that he concurs in the opinion which I am about to read and also in that of my noble and learned friend Lord Romer which will be subsequently read.

My Lords, in his printed case the appellant states that "The "respondent deserted the appellant on August 11, 1934, "and the question for decision in this appeal is whether "that desertion was terminated by the respondent writing "two letters dated the 23rd and the 25th September, "1936, to the appellant suggesting a meeting between the

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(1) (1866) 15 L. T. 448.
(2) [1924] P. 194.
(3) [1925] P. 187.
(4) (1910) 26 Times L. R. 388.

"appellant and the respondent." I take exception to this way of stating the question which your Lordships have to decide.

By s. 2 of the Matrimonial Causes Act, 1937, it is enacted that a petition for divorce may be presented on the ground that the respondent "has deserted the petitioner without "cause for a period of at least three years immediately "preceding the presentation of the petition." By s. 4 it is provided that "on a petition for divorce it shall be the duty "of the Court to inquire, so far as it reasonably can, into the "facts alleged," and, "if the Court is satisfied on the evidence "that the case for the petition has been proved . . . . the "Court shall pronounce a decree of divorce." The question for decision accordingly is whether the appellant has proved to the satisfaction of the House that for at least three years the respondent has without cause deserted him. The fact that the petition is unopposed in no way absolves the appellant from the obligation of discharging the burden of proof imposed on him or this House from the duty of satisfying itself that the case has been proved.

In my opinion what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of the three years the respondent has without cause been in desertion. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfilling its duty of determining whether on the evidence a case of desertion without cause has been proved the Court ought not, in my opinion, to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back, or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion. In Scotland, where desertion has been a ground of divorce since 1573, the pursuer has always been required to satisfy the Court that throughout the period of desertion he or she was ready and willing to receive back the erring spouse. The recent Divorce (Scotland)

H. L. (E.)
1939
PRATT
v.
PRATT.
Lord Macmillan.

Act, 1938, in amending the law has enacted that the Court may grant decree of divorce on the gound "that the defender "has wilfully and without reasonable cause deserted the "pursuer and persisted in such desertion for a period of not "less than three years." The language of the Scottish Act is rather more expanded than that of the English Act, but the two statutes are substantially equivalent. In a case decided by the Second Division of the Court of Session this year it has been held that the law still requires, as it has always required in the past, that regard should be had to the attitude of mind of the spouse who is seeking the remedy: *Macaskill* v. *Macaskill.* (1) I quote the following passage from the opinion of the learned Lord Justice-Clerk (Aitchison) (2): "The essential "character of desertion remains unchanged. It must be a "separation against the will of the spouse seeking the remedy "of divorce. Separation of consent, whether express consent "or implied from facts and circumstances, is not desertion. "The judge therefore must be satisfied that the aggrieved "spouse has been willing to fulfil the duties of the marriage "throughout the whole statutory period, so that, if the "offending spouse had returned, he or she would have been "willing to resume the normal relationships of marriage and "continue to adhere, always provided that it was a bona fide "return, and not merely a device to interrupt the currency "of the desertion. The pursuer's state of mind is an essential "feature of the inquiry. But when it is said, as it frequently "has been said in these cases, that the pursuer must desire "the return of the offender, it is not to be taken in too literal "a sense as signifying the requirement of a subjective state "of mind, a desire in the emotional sense. It is obvious that "in a great many cases of desertion, the conduct of the "deserting spouse must have been of a kind to destroy affection, "and that it would be a mockery for the innocent spouse to "pretend that there was or had been a desire for the resumption "of the married life. It is enough that a pursuer should be "able honestly to say that he or she was all along willing to "fulfil the duties of the marriage, and that the desertion was

(1) 1939 S. C. 187. (2) Ibid. 193.

"against his or her will, and continued throughout the "statutory period without his or her consent."

In quoting these words I am not to be taken as laying down that the law as to divorce for desertion is in all respects the same in England as it is in Scotland. I quote them rather as expounding an element which in my view is inherent in the conception of marital desertion—namely, that the desertion must be persisted in without the consent and against the wishes of the deserted spouse.

In the present case the respondent undoubtedly deserted the appellant on August 11, 1934. But within the statutory three years the respondent wrote to the appellant on September 23, 1936, proposing a meeting. The appellant replied on the following day that he did not think an interview would serve any useful purpose. In a further letter to the appellant, dated September 25, 1936, the respondent urged the appellant to agree to meet her. In this letter she wrote as follows: "I am "feeling that, as we are still married, it will be best if we "can come together, as it is undoubtedly the only course. "My idea in coming to see you was to discuss this and suggest "that we should meet occasionally and go out together, in "short, make a new start, with a view to making a home "together in the future." To this the appellant once more replied that he "did not consider an interview would serve "any useful purpose." Your Lordships have no reason to regard the respondent's letters as insincere. They certainly cannot have been written as a device to interrupt the running of the statutory three years, for in October, 1936, the Matrimonial Causes Act had not been passed, and the law of England did not then permit of divorce for desertion.

In my opinion Finlay J. and the Court of Appeal were right in holding that a husband who had point-blank repelled such overtures on the part of his erring wife had failed to prove that she had been in desertion without cause for the statutory period. By the attitude which the appellant took up he himself caused the desertion to continue or at least prevented the possibility of its termination. I accordingly concur in the motion that this appeal be dismissed.

LORD WRIGHT. My Lords, the opinion which I am about to read is that of my noble and learned friend Lord Romer. I have considered that opinion in print and I agree with it. I am also authorized by my noble and learned friend Lord Porter to say that he too agrees with Lord Romer's opinion.

LORD ROMER (read by LORD WRIGHT). My Lords, on January 1, 1938, the appellant filed a petition for the dissolution of his marriage with his wife, the respondent, alleging that she had deserted him for a period of three years and upwards immediately preceding the date of the petition. The only question to be determined upon this appeal is whether that allegation has been proved to be true.

The facts relevant to the consideration of this question are as follows: the marriage between the appellant and respondent took place on September 14, 1933. The parties thereafter resided together at Lloyds Bank House, Blandford, until August 11, 1934. On that day the respondent left the matrimonial home and has never since returned to it. She has never suggested that the appellant had been guilty of any matrimonial offence, and her desertion of him at that time was without any cause which the law can regard as being just or reasonable. During the remainder of the year 1934 correspondence took place between the parties and between their respective solicitors with a view to bringing about a reconciliation; but the respondent was only prepared to return to the matrimonial home upon conditions that the appellant was justified in rejecting as being unreasonable. The correspondence was renewed by the respondent in the month of June, 1935, when she suggested that the appellant should furnish her with evidence on which she could obtain a divorce. "Will "you," she wrote, "do the gentlemanly thing and give me "my freedom, i.e., cause to divorce you?" This grossly improper suggestion on her part was immediately and very rightly rejected by the appellant. From that time until September, 1936, no further advance was made by the respondent, and it is plain that between August 11, 1934, and that date she had been continuously deserting the appellant without cause. But in September, 1936, the respondent began a further correspondence with the appellant, and this correspondence has such a vital bearing upon the question before your Lordships' House that two of the letters must be set out in full.

The first of these is dated the 23rd of that month and is in the following terms :—

"Dear Frank,

"You will, no doubt, be very surprised to hear from me. I "am, however, writing to say I should like to see you, and am "thinking about coming over one day next week. Which "day suits you best? I suppose Wednesday? Do not "imagine I am coming in a hostile spirit, I wish to meet you "perfectly agreeably, and trust you will do the same. I wish "to have a talk with you, but I am anxious for it to be a per-"fectly pleasant one. I have had every intention of coming in for "some time, but when passing have always been with friends.

"Will you let me know what day suits you, any day bar "Tuesday suits me, or if you prefer to meet me anywhere "outside, I am perfectly willing.

"I am, Your wife,
"Eileen.

"P.S. I have a nice house here and lovely garden, and you "are always quite welcome if you care to come. E."

The only response vouchsafed by the appellant to this friendly overture was a curt note dated September 24 in which, after acknowledging its receipt, and referring to a letter she had written to him in July, 1935, he stated that he did not think an interview would serve any useful purpose. On September 25, 1936, however, the respondent made yet one more attempt to bring about a meeting with the appellant. She wrote as follows :—

"Dear Frank,

"Your letter received. I suppose the letter to which you "refer was the one I wrote offering you your freedom, feeling "at the time that it was the only way out of an anomalous "position. You preferred to remain tied. But a good deal "of time has passed since then, and I am feeling that, as we

H. L. (E.)
1939
PRATT
v.
PRATT.
Lord Romer.

"are still married, it will be best if we can come together, as "it is undoubtedly the only course. My idea in coming to "see you, was to discuss this, and suggest that we should meet "occasionally and go out together, in short, make a new start, "with a view to making a home together in the future.

"I should like you to come and see me, and have no wish "for further hostilities or bitterness, which do neither of us "any good. Therefore I am sure you will see that it is essential "we meet and that the future shall be arranged between us "as agreeably as possible. Anything you have to say as "regards this, or suggestions you may make, I shall be pleased "to consider. As I wrote, any day or time, bar Tuesday, will "suit me next week. Please let me know.

"Eileen."

This letter was no more successful than the former one. The appellant wrote to his wife that her letter "of the 25th inst." was "to hand" and that he could only repeat what he had said in his letter "of the 24th inst." that he did not consider an interview would serve any useful purpose.

I ought, perhaps, to have stated that the appellant is a Bank Manager.

Her husband's very business-like replies to her two friendly letters seem to have produced in the respondent a not altogether unpardonable feeling of irritation. She referred to them in a letter of October 1, 1936, as his two absurd little notes, and expressed her sorrow that he should have no decent feelings. "I was willing," she added, "to do my part, it was up to you "to do yours." And that was the last letter that passed between them. The respondent made no further attempt to bring about a reconciliation or a resumption of conjugal relations, and on January 1, as I have already stated, the appellant filed his petition for divorce. The respondent entered an appearance, but filed no answer, and on July 13, 1938, the case came on for hearing before Finlay J. (as he then was) at the Winchester Assizes as an undefended cause. The appellant was the only witness. He narrated the circumstances leading up to the departure of the respondent from the matrimonial home on August 11, 1934, and stated that he had not seen her since that date. With reference to the respondent's letters of the 23rd and 25th September, 1936, he said that he had formed the view that she was not honest in the desire that she expressed of wanting to come back to him. This was not, however, the view that was taken of the letters by Finlay J. He thought that it was impossible to say after these letters that she was still guilty of the matrimonial offence of desertion. He accordingly dismissed the petition.

The appellant thereupon took the matter to the Court of Appeal, where it was heard on December 15, 1938, by Scott, MacKinnon, and du Parcq L.JJ. Scott L.J., in whose judgment the other Lords Justices concurred, after reading the letters of September, 1936, said this (1): "We have considered "the cases which have been cited to us and we do not think "that they demonstrate any principle of law which is applicable "to the question we have to decide. That question is whether "or not the husband can say that his wife still deserted him "without cause after he had refused even to see her and discuss "their relations with her. In my view, it is impossible to say "that the decision of Finlay J. on that matter was wrong. "When two married persons are living apart in circumstances "which constitute desertion of the one by the other and the "guilty party writes to the other and asks for an interview to "discuss the position, there is a duty on the party receiving "that request at least to see the other spouse and give him "or her an opportunity of saying what he or she wishes to "say. In my opinion Finlay J. was right."

The appeal was accordingly dismissed. The appellant, however, managed to obtain leave from the Court to bring the matter before this House, and the present appeal is the result.

My Lords, it is plain from this narrative of the facts that, if the letters of the 23rd and 25th September, 1936, had never been written, the appellant would have been entitled to the decree that he sought. For he himself would have been under no legal obligation to take any steps to induce the respondent to return.

But can it be said in view of those letters that the respondent

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(1) [1939] P. 119.

H. L. (E.)
1939
PRATT
v.
PRATT.
Lord Romer.

thereafter was continuing to desert her husband? For the purpose of assisting your Lordships in answering this question Mr. Noel Middleton on behalf of the appellant called your Lordships' attention to several reported cases in which the subject of desertion by one of the spouses of the matrimonial domicil has been considered by the Courts. These were, no doubt, the authorities that had been cited to the Court of Appeal and were referred to by Scott L.J. in the passage in his judgment to which I have already referred. I agree with him in thinking that they do not lay down any principle of law applicable to the question that we have to decide. For, as was pointed out by Warrington L.J. in one of them, approving a statement made in the Divisional Court: "The "question whether desertion continues is one of fact to be "determined in view of the circumstances of the particular "case." That was the case of *Thomas* v. *Thomas* (1), where a husband shortly after committing the matrimonial offence of desertion had written to his wife offering to resume cohabitation. The Court, however, came to the conclusion that the husband's offer was not a genuine one. His desertion was accordingly treated as continuing notwithstanding the offer.

My Lords, in the present case, I can find nothing that even remotely suggests that the offer of the respondent contained in the two September letters was otherwise than genuine. The appellant indeed concedes that the writing of the letters was a spontaneous act on the part of the respondent and not one done upon the advice or at the instigation of her legal advisers. Nor does he suggest that the letters were written for the purpose of being used by her in any legal proceedings. All that he could say about the letters when giving his evidence was that he took the view at the time that the respondent was not "honest in her desire to come back." By this, I think, he must have meant that she only desired to come back on conditions to which he could not be expected to submit. But there is no word in either letter to justify any such suspicion on his part. Nor should I have expected there to be. For she had tried to impose such conditions in the correspondence

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(1) [1924] P. 194.

H. L. (E.)

1939

PRATT v. PRATT.

Lord Romer.

in 1934. Her effort had failed at that time and there was no reason to suppose that a similar effort would succeed in 1936. The letters, in my opinion, indicate a genuine and honest desire to see and discuss matters with her husband in the hope that this would result in their "coming together," in their making "a new start," and "a home together in the future." It is idle to suggest that she had it in her mind to impose conditions which she knew would effectually prevent any of these results being attained.

It was indeed at one time contended by Mr. Middleton that mere letters, however sincere, could never put an end to the respondent's desertion. Nothing, he argued, short of an actual return to the matrimonial domicil could have this effect. My Lords, I find myself wholly unable to accede to this contention. It would, in my opinion, be quite unreasonable to hold that the respondent, guilty though she was of the serious matrimonial offence of desertion, should be expected to present herself at her husband's door without any knowledge of how she would be received, and therefore at the risk of being subjected to the indignity of having admission refused her by her husband or by one of his servants. It is, moreover, to be remembered that by September, 1936, the respondent had been living away from her husband for over two years. In such circumstances there would necessarily be, apart altogether from other matters, many arrangements of a domestic character to be made and discussed before they could take up their married life at the point at which it had been broken off. It is plain, therefore, that before the respondent could return there would have to be some sort of discussion between her husband and herself in person or by letter. It could not be expected that she should suddenly make an unheralded entry into his house. But even so, it was argued, it was necessary in order to put an end to her desertion for the respondent to take some active step towards returning to the matrimonial domicil. This, no doubt, is true. But in writing the letters of September, 1936, she did take such a step, and the only one that she could reasonably be expected to take in the circumstances. Whether the

H. L. (E.)
1939
PRATT
v.
PRATT.
Lord Romer.

meeting for which she asked would have brought about a reconciliation between the two is a question that must ever remain unanswered. The respondent never in fact returned to her husband. But in view of his refusal to allow a meeting to take place, her continued absence thereafter cannot without an utter misuse of language be called a desertion.

My Lords, for these reasons I am of opinion that the decisions of Finlay J. and the Court of Appeal were right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Peacock & Goddard, for Traill, Castleman-Smith & Wilson, Blandford.*

[HOUSE OF LORDS.]

H. L. (E.)

1939

June 29, 30.

FARLEY AND OTHERS . . . . APPELLANTS;

AND

WESTMINSTER BANK AND OTHERS . . RESPONDENTS.

Charity—Will—Gifts to vicar and churchwardens of two named parishes —" For parish work "—Validity—Intestacy.

A testatrix bequeathed the residue of her estate in equal shares to two charities and to the respective vicars and churchwardens of two named churches " for parish work " :—

Held, that, as the words " for parish work " would in their ordinary meaning include objects which were not charitable in the legal sense, those gifts were not charitable and consequently failed.

Decision of the Court of Appeal [1938] Ch. 482 affirmed.

APPEAL from a decision of the Court of Appeal affirming a decision of Luxmoore J.

By her will dated August 16, 1933, Emma Mary Ashton, of Kensington (hereinafter called " the testatrix "), after appointing the Westminster Bank sole executor and trustee thereof, and after the devise and bequest of certain real and personal estate, and the gift of certain pecuniary legacies free of duty, gave and appointed everything whereof she had power to dispose by her will and whereof she had not thereinbefore effectively disposed, to her trustee upon trust to sell and convert the same into money and thereout to pay her debts and funeral and testamentary expenses and all death duties (including all legacy and succession duty payable in respect of her death upon anything passing under her will) and the cost of administering the trusts thereof " and to "stand possessed of the residue upon trust in equal shares "for St. Clement's Mission, Notting Dale (of which my uncle "Edmund Waller was founder and which he and I have "supported) for their mission work, the Society for the "Propagation of the Gospel in Foreign Parts, the Vicar and "Churchwardens of St. Columba's Church Hoxton (for parish

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* *Present :* LORD ATKIN, LORD RUSSELL OF KILLOWEN, and LORD ROMER.

H. L. (E.)
1939
FARLEY
v.
WESTMINSTER
BANK.

"work), and the Vicar and Churchwardens of St. Cuthbert's "Church, Philbeach Gardens, Kensington (for parish work)."

The testatrix died in March, 1935, and her will was proved on June 13, 1935.

The appellants, the Rev. G. W. Farley and G. Hammersley, were the vicar and one of the churchwardens of St. Columba's, Hoxton. The appellants J. M. Nicolle and J. F. C. Carter were the churchwardens of St. Cuthbert's, Philbeach Gardens, Kensington, the Rev. F. G. Croom, who was the vicar of that church at the date of the death of the testatrix, having since died. Both the said parishes, St. Columba, Hoxton, and St. Cuthbert, Kensington, existed as parishes for ecclesiastical purposes only.

Doubts having arisen whether the gifts to the vicars and churchwardens of these two parishes "(for parish work)" were valid charitable bequests, an originating summons was taken out by the executor for the determination of the question whether they were valid or whether they failed and so passed as on the intestacy of the testatrix.

Luxmoore J. held that the gifts were not charitable and consequently failed, and his judgment was affirmed by the Court of Appeal (Sir Wilfrid Greene M.R. and Farwell J., Clauson L.J. dissenting).

The vicars and churchwardens of both parishes appealed to this House.

H. B. Vaisey K.C. and *W. S. Wigglesworth* for the appellants. The question is whether in the gifts to the vicars and churchwardens of the two parishes the addition of the words in brackets "for parish work" invalidates them and prevents them being charitable. If the gifts had been to the vicars and churchwardens simpliciter, there could be no doubt of their validity, and it seems an odd result that the addition of those words should invalidate them. We submit that the words "for parish work" neither add to nor take away from the gift; they merely indicate that the gifts are not for the vicars and churchwardens personally but are to be used by them for charitable objects within the parishes. In the

Australian case of *In re Macgregor. Thompson* v. *Ashton* (1), where all the cases on the subject were elaborately reviewed by Long Innes J., it was held that a gift "for diocesan purposes" and "for diocesan purposes generally" were valid, inasmuch as every diocesan purpose was a religious purpose and charitable in the legal sense, and as such valid. So in this case the gifts to those who administer charity in the two parishes must be deemed to be charitable in the legal sense, seeing that they are to be devoted to those ends within the parishes. The gifts are to the vicars and churchwardens, who are the persons charged with the duty of carrying on the spiritual work in the parishes. In *Income Tax Commissioners,* v. *Pemsel* (2) Lord Macnaghten said (3): that "charity in "its legal sense comprises four principal divisions: trusts for "the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts "for other purposes beneficial to the community, not falling "under any of the preceding heads. The trusts last referred "to are not the less charitable in the eye of the law, because "incidentally they benefit the rich as well as the poor, as "indeed, every charity that deserves the name must do either "directly or indirectly." We submit that the gifts in the present case come within one or other of the classes enumerated by Lord Macnaghten. In *Dunne* v. *Byrne* (4) a residuary bequest "to the Roman Catholic Archbishop of Brisbane and "his successors to be used and expended wholly or in part "as such Archbishop may judge most conducive to the good "of religion in this diocese" was held not to be a good charitable bequest, but there the words "wholly or in part" introduced ambiguity, and, further, the purposes might include one or more which could not be considered charitable in law but which nevertheless the Archbishop might think conducive to the good of religion in the diocese. In *In re Bain* (5) a bequest "unto the vicar of St. Alban's Church, "Brooke Street, Holborn, E.C., for such objects connected

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(1) (1932) 32 New South Wales Rep. 483.

(2) [1891] A. C. 531.

(3) [1891] A. C. 583.

(4) [1912] A. C. 407.

(5) [1930] 1 Ch. 224.

"with the church as he shall think fit" was held a valid charitable bequest. Again, in *In re Schoales* (1) a bequest "to the Roman Catholic Church, for the use thereof" was held good. In *In re Stratton* (2) a bequest to the vicar for the time being of a certain parish "to be by him distributed at "his discretion among such parochial institutions or purposes "as he shall select" was held invalid, but there again the language was very different, and, further, the vicar was given a discretion as to the objects.

Charles Harman K.C. and *Reginald W. Goff*, for the next of kin, were not called upon.

Sir Terence O'Connor S.-G. and *A. Andrewes-Uthwatt* for the Attorney-General.

LORD ATKIN. The question which arises in this case is whether there was or was not a valid gift by the will of the testatrix, which was made on August 16, 1933. After giving certain legacies, she made the following residuary gifts: she directed that her trustees were "to stand possessed of the "residue upon trust in equal shares for St. Clement's Mission, "Notting Dale (of which my uncle Edmund Waller was "founder and which he and I have supported) for their mission "work, the Society for the Propagation of the Gospel in "Foreign Parts, the Vicar and Churchwardens of St. Columba's "Church, Hoxton (for parish work), and the Vicar and Church-"wardens of St. Cuthbert's Church, Philbeach Gardens, "Kensington (for parish work)." The question is whether the last two gifts are valid, or whether they are not too vague as going beyond what is within the meaning of the law a charitable gift. If they go beyond the legal definition of a charitable gift, they are too vague. The principle has been expressed, perhaps as well as it could be expressed, by Lord Macnaghten in delivering the judgment of the Privy Council in *Dunne* v. *Byrne*. (3) In that case the gift was expressed in these words: "I will and bequeath . . . . that "the residue of my estate should be handed to the Roman

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(1) [1930] 2 Ch. 75.
(2) [1931] 1 Ch. 197.
(3) [1912] A. C. 407.

"Catholic Archbishop of Brisbane and his successors to be "used and expended wholly or in part as such Archbishop "may judge most conducive to the good of religion in this "diocese," and it was held that that was not a good charitable bequest and was void. I do not quote the case at all because of the terms of that bequest, but because of what was said in the judgment (1): "The language of the bequest (to use "Lord Langdale's words) would be 'open to such latitude "'of construction as to raise no trust which a Court of Equity "'could carry into execution,'" and for that, Lord Macnaghten quotes the case of *Baker* v. *Sutton*. (2) Lord Macnaghten continues: "If the property, as Sir William Grant said in "*James* v. *Allen* (3) 'might consistently with the will be "'applied to other than strictly charitable purposes, the "'trust is too indefinite for the Court to execute.'"

The question is, what is the meaning of the words "the "Vicar and Churchwardens of St. Columba's Church, Hoxton "(for parish work)"? Mr. Vaisey, in the course of a forcible argument on behalf of the appellants, said that that is just equivalent to a gift to the vicar and churchwardens of St. Columba's Church, Hoxton—it is in fact in Haggerston, but we need not trouble about that—and he says that that would mean a gift to the vicar and churchwardens for the purpose of their spiritual duties as vicar and churchwardens, and that it would be a good charitable bequest—and that is perfectly true—if there were no words added. Then he says that the words "(for parish work)" simply mean to express what would be implicit in the words "the Vicar and Churchwardens" without the addition of those words in brackets; and, if so, he says, there is nothing to prevent this gift from being a charitable gift; or, he says, the words limit their duties in some particular respect which I do not think he found it very easy to define, and which, if he finds it difficult, I find it still more difficult to define; but in some sense or other he says that the words limit what would be ordinarily understood if you had a gift to the vicar and churchwardens simply.

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(1) [1912] A. C. 411.
(2) (1836) 1 Keen, 224, 233.
(3) (1817) 3 Mer. 17.

H. L. (E.)
1939
FARLEY
v.
WESTMINSTER
BANK.
Lord Atkin.

My Lords, I am entirely unable to accept that construction. I think the words are quite plainly enlarging words. They are words of definition, it is quite true, but I think they were used for the very purpose of defining what the testatrix meant as the purpose for which the money was to be applied, and " parish work " seems to me to be of such vague import as to go far beyond the ordinary meaning of charity, in this case in the sense of being a religious purpose. The expression covers the whole of the ordinary activities of the parish, some of which no doubt fall within the definition of religious purposes, and all of which no doubt are religious from the point of view of the person who is responsible for the spiritual care of the parish in the sense that they are conducive, perhaps, to the moral and spiritual good of his congregation. But that, I think, quite plainly is not enough; and the words are so wide that I am afraid that on no construction can they be brought within the limited meaning of " charitable " as used in the law. I find myself in entire accord with what was said by the Master of the Rolls in the Court of Appeal, in a passage which I will read. " To my "mind," he said (1): " the whole question in this case turns "on whether or not the words ' for parish work ' can in some "way be limited, either by their own inherent meaning or "by reference to the character and quality of the trustees. "I have come to the conclusion, and I do so with regret, that "that limitation cannot be imposed upon the words. It "seems to me that the words ' for parish work ' are of a very "wide character and embrace not merely those limited "functions in the parish which it is the duty of the vicar to "perform, or those limited functions in the parish which it "is the duty of the churchwardens to perform; nor can I limit "those words by narrowing them down to religious purposes "in the strictly charitable sense. It appears to me that, "taking them as words of ordinary English, they cover any "activity in the parish, any work in the parish which trustees "of that character may be expected to perform, whether that "work be strictly a religious purpose or strictly a charitable

(1) [1938] 1 Ch. 495.

"purpose, or whether it be a work considered to be conducive "to the good of religion, or considered to be benevolent or "generally useful to the inhabitants of the parish or the "congregation of the church. It seems to me that the words "'for parish work' cannot be cut down or limited, either "by construing them in isolation, or by reference to the "character of the trustees."

My Lords, it seems to me that that is quite sufficient to dispose of this case. I find myself quite unable to disagree with the views taken by Luxmoore J., by the Master of the Rolls, and by Farwell J. I am sorry not to be able to accept the view taken by Clauson L.J., but I think it would be too narrow a view, upon these words. I share the regret which has been expressed by all the judges in coming to this conclusion.

I think that this case is a warning to those persons who desire to make wills with a benevolent intention, giving legacies for charitable purposes in the broad sense of the word, that they should make it clear that their objects are within the legal definition of charity, and are certain. But the law has been the law now for a very great number of years, and it is quite plain to my mind that words of such general import as these are suggest an uncertainty of purpose which it is quite impossible to bring within the purview of the law of trusts.

I am of opinion, therefore, that this appeal should be dismissed. It is a case which has given rise to judicial doubt, and which I think it was very proper for the persons representing these parishes to bring to a decision in this House. I notice that there was a condition made on giving leave to appeal that there should be no opposition offered to a suggestion that the costs should come out of the two bequests which fail. Of course, we are not bound by that condition, but it appears to me to be one which it would be quite proper to make, and in those circumstances I propose to your Lordships that the appeal should be dismissed, and that the costs should come out of the two funds in question.

LORD RUSSELL OF KILLOWEN. My Lords, I agree. Clauson L.J. found himself able to construe this gift as a gift to the vicar and churchwardens, the purposes for which the money was to be applied being restricted by the words in brackets to the furtherance of work which it was the duty of the vicar and churchwardens to perform ; that is to say, that the application of the money was restricted to what I may call the religious purposes of the parish in the strict sense. For myself, I am unable to put so narrow a construction upon the words used by the testatrix. In my opinion, upon the true construction of this will, the words in brackets mean that the gift is not a gift for ecclesiastical or religious purposes in the strict sense, but is a gift for the assistance and furtherance of those various activities connected with the parish church which are to be found, I believe, in every parish, but which, unfortunately for the donees here, include many objects which are not in any way charitable in the legal sense of that word.

I find myself in complete agreement with the judgments delivered by the Master of the Rolls and by Farwell J., and I would accordingly dismiss this appeal, but with the provision as to costs which has been referred to by the noble Lord on the Woolsack.

LORD ROMER. My Lords, I too agree. Notwithstanding the excellent argument which we have heard from Mr. Vaisey, I find myself quite unable to extract from the will or the surrounding circumstances, to which we can refer, any justification for giving to these words " for parish work " any other than their ordinary meaning ; and it is, I think, without question that their ordinary meaning includes objects which are not charitable in the legal sense of the term. Great reliance was placed by Mr. Vaisey upon the fact that the trustees who are to administer these two funds are the vicar and the churchwardens of these respective parishes ; but I find myself in complete agreement with what was said by Farwell J. in the Court of Appeal in these words (1) :

(1) [1938] Ch. 503.

"It is only, in my judgment, in a case where the trust itself "is not specified that the office of the trustees may be "considered, in order, if possible, to ascertain the purpose of "the trust." In the present case the trust itself is specified quite clearly.

My Lords, I agree with the motion which has been proposed.

Appeal dismissed.

Solicitors for appellants: *Thomas Eggar & Son.*
Solicitors for next of kin: *Ravenscroft, Woodward & Co.*
Solicitor for Attorney-General: *Treasury Solicitor.*

[PRIVY COUNCIL.]

WRIGHT AND ANOTHER . . . . . APPELLANTS ;

AND

NEW ZEALAND FARMERS CO-OPERATIVE ASSOCIATION OF CANTERBURY, LIMITED . . . . . RESPONDENTS.

J. C.*
1939
April 27.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Mortgage—Sale of mortgaged property—Default by purchaser—Sale not completed—Contract rescinded by mortgagee—Subsequent resale at lower price to another purchaser—Mortgagee not accountable to mortgagor for agreed purchase price on first uncompleted sale—Land Transfer Act, 1915, *Fourth Schedule, cl.* 7 *—Guarantee—Construction—Limitation.*

Where a mortgagee, in exercise of his power of sale, had contracted to sell the mortgaged property, but, on failure by the purchaser to carry out the contract, and before the property had become vested in the purchaser, had rescinded the contract pursuant to his powers thereunder and sold the mortgaged property to another purchaser at a lower price than that agreed upon with the first purchaser :—

Held, that the mortgagee was not accountable to the mortgagor for the purchase price for which the property was agreed to be sold under the rescinded contract, and which he had never received.

Irving v. *Commercial Banking Co. of Sydney* (1897) 19 N. S. W. R. Eq. 54, approved.

A guarantee whereby A guaranteed the repayment by B of moneys advanced to B by C provided that it " shall be a continuing " guarantee and shall apply to the balance that is now or may " at any time hereafter be owing " to C by B on B's current account with C for goods supplied and advances made by C :—

Held, that what was guaranteed was the repayment of every debit balance as it was constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. The question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted, and the number of years which had expired since any individual debit was incurred was immaterial. A's liability was not therefore barred in respect of each advance made by C on the expiration of six years from the date of such advance.

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* *Present :* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, and LORD ROMER.

Parr's Banking Co., Ld. v. *Yates* [1898] 2 Q. B. 460; 67 L. J. (Q. B.) 851 considered.

Judgment of the Court of Appeal of New Zealand [1935] N. Z. L. R. 614 and [1936] N. Z. L. R. 157, affirmed.

APPEAL (No. 28 of 1938) from a judgment of the Court of Appeal of New Zealand (December 4, 1935) affirming a judgment of the Supreme Court of New Zealand (October 12, 1934).

In July, 1928, the appellant, Douglas George Wright, owned a farm called "Cattle Peaks," which was subject to a first mortgage for 9425*l*. By memorandum of mortgage, dated July 27, 1928, he mortgaged "Cattle Peaks" to the respondents, the New Zealand Farmers Co-operative Association of Canterbury, Ld., subject to the before-mentioned mortgage. By virtue of cl. 7 of the Fourth Schedule to the Land Transfer Act, 1915, the mortgage of July 27, 1928, conferred upon the respondent Association a power of sale in the following terms: ". . . . The mortgagee may sell the "mortgaged property, or any part thereof, ... and subject "to such condition as to title . . . . time or mode of payment "of purchase-money, or otherwise as the mortgagee thinks "fit, with power to the mortgagee to buy in the mortgaged "property or any part thereof at any sale by auction or to "rescind any contract for the sale thereof, and to resell the "same without being answerable for any loss or diminution "in price, ..."

By an agreement, dated May 8, 1929, the power of sale being then exercisable, the respondent Association, as mortgagee, agreed to sell "Cattle Peaks" to one Little for 15,317*l*. 5*s*. The purchase-money was to be paid as to 2000*l*. on the signing of the agreement. This sum was duly paid. The sum of 9425*l*. was to be paid by Little assuming liability for the first mortgage of that amount, and the balance of 3892*l*. 5*s*. was to be paid on March 23, 1934. Little was given possession of the property, but no transfer of it to him was ever effected. The agreement, however, provided that if Little made default, the respondent Association might re-enter on the land, and (whether it had re-entered or not) resell the land. Little failed to carry out the contract, and the respondent Association rescinded the agreement with him and sold "Cattle Peaks" to another purchaser, but for a price considerably lower than that payable under the first agreement. The second agreement was carried to completion and the land vested in the second purchaser.

The respondent Association credited the appellant Wright with all moneys received from Little under the agreement of May 8, 1929, and with the full price for which the property was sold under the second agreement. Wright, however, contended that he was not concerned with the second sale, and in his action, filed on July 16, 1934, claimed (inter alia) that he was entitled to be credited with the whole of the price for which the property was contracted to be sold under the first agreement. The first question arising in this appeal was whether that claim was well founded or not.

The Court of Appeal of New Zealand (Myers C.J., Reed, Smith and Fair JJ.), unanimously affirming the decision of the Supreme Court of New Zealand (Johnston J.), dismissed the claim.

A second point arose in this appeal out of a guarantee in writing, dated August 11, 1909, whereby the appellant Wright had guaranteed to the respondent Association payment by two sheep farmers named Nosworthy of their indebtedness to the respondent Association in the following terms: ". . . .
"2. This guarantee shall be a continuing guarantee and shall "apply to the balance that is now or may at any time hereafter "be owing to you by the said William Nosworthy and Robert "Nosworthy on their current account with you for goods "supplied and advances made by you as aforesaid. . . . ."

By letter, dated April 25, 1931, Wright terminated his guarantee. The balance due on that date by the Nosworthys to the respondent Association was 11,816*l.* 10*s.* 4*d.* The account was ruled off in the Association's books at that figure. The Nosworthys having made default, the Association counterclaimed in the present action for payment by Wright of the said sum of 11,816*l.* 10*s.* 4*d.*, with interest thereon. Wright pleaded that the claim was barred by the Limitation Act (21 James I., c. 16) or, in the alternative, by the Statute

J. C.
1939
WRIGHT
v.
NEW
ZEALAND
FARMERS
CO-OPERATIVE
ASSOCIATION
OF
CANTERBURY.

3 & 4 Wm. IV., c. 42, his contention being that his liability as guarantor was barred in respect of each advance made to the Nosworthys on the expiration of six years from the date of the advance.

The trial judge decided against that contention, and entered judgment on the counterclaim for the Association for 13,384*l*. 13*s*. 9*d*. in respect of the guarantee and interest. Wright's appeal from that judgment was dismissed by the Court of Appeal of New Zealand.

The appeal is reported at [1935] N. Z. L. R. 614; and [1936] N. Z. L. R. 157.

1939. March 27, 28. *Charles A. Settle* for the appellants. There are two main points: Whether a mortgagee selling under his power of sale pursuant to the provisions of the Land Transfer Act, 1915, on terms of credit is bound to account to the mortgagor at the date of the sale for the total purchase price payable, or when he actually receives the moneys, or, alternatively, on the due dates for the payment thereof. The second point arises on a counterclaim in connection with a guarantee in respect of a bank overdraft, and the question is whether the Statute of Limitations runs in favour of a guarantor from the date of each separate advance or from the date when the final balance is struck.

The words in cl. 7 of the Fourth Schedule to the Land Transfer Act, 1915, are not really in substance any larger than those used in the Law of Property Act, 1925: they are words explanatory for the benefit of the purchaser. It is submitted that "sale" in cl. 7 includes "agreement to sell." The matter can be put in two ways: either the purchase price became payable to the mortgagor at once, or, alternatively, it should be credited in account with the mortgagor on the due dates for the payment of the amounts to the mortgagee. The completion of the contract is at the risk of the mortgagee, who is bound to account to the mortgagor for the whole of the agreed price. If the Board are against the appellant on this point, having regard to the fact that a mortgagor cannot exercise his right of redemption pending

J. C.
1939

WRIGHT
v.
NEW
ZEALAND
FARMERS
CO-OPERATIVE
ASSOCIATION
OF
CANTERBURY.

this period, the effect of leaving money unpaid on a valid contract of sale is a clog on the equity of redemption, and no draftsman ever intended to give a mortgagee power to clog the equity of redemption. [Reference was made to *Waring* (*Lord*) v. *London and Manchester Assurance Co.* (1) and *Public Trustee* v. *Wallace.* (2)] *Irving* v. *Commercial Banking Co. of Sydney* (3) decides no more than that the phrase "for cash or credit" precludes the mortgagor from recovering more than the surplus actually in hand.

With regard to the second point, on the respondents' counterclaim, it is submitted that the Statute of Limitations runs from the date of each advance. From the report in the Law Journal Reports in *Parr's Banking Co., Ld.* v. *Yates* (4) it would appear that the guarantee there was a guarantee of a balance, and therefore on all fours with the present case. In *Parr's* case (4) the principal debtor made payments to the credit of the account almost to the date of the action brought. Having regard to the fact that a guarantee of a current account necessarily involves the payment of a balance, it means that the account is of a fluctuating nature, and therefore the wording of the guarantee in the present case and in *Parr's* case (4) does not raise any distinction which would enable the Board to say that the present case is outside what appears to be the rule in *Parr's* case (4)—that the Statute of Limitations runs from the date of each advance.

Wilfrid Barton K.C. and *A. M. Wallace* for the respondents were not called upon to argue.

April 27. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN. This appeal was brought by the plaintiffs in an action against the New Zealand Farmers Co-operative Association of Canterbury, Ld. (hereinafter referred to as "the Association"), from a judgment of the Court of Appeal of New Zealand which affirmed the judgment of the trial judge, by which judgment was entered for the

(1) [1935] 1 Ch. 310.
(2) [1932] N. Z. L. R. 625.
(3) (1897) 19 N. S. W. R. Eq. 54.
(4) [1898] 2 Q. B. 460; 67 L. J. (Q. B.) 851.

defendants in the action, and judgment was entered for the defendants on a counterclaim by them for (amongst other relief) a sum of 13,384*l.* 13*s.* 9*d.*

Two questions only were argued before their Lordships' Board; they are unconnected, and may be dealt with separately.

The relevant facts upon which the first question is founded may first be stated. In July, 1928, the plaintiff Wright owned a farm called "Cattle Peaks," which was subject to a first mortgage for 9425*l.* By memorandum of mortgage, dated July 27, 1928, the plaintiff Wright mortgaged "Cattle Peaks" to the Association, subject to the before-mentioned mortgage. By virtue of the Land Transfer Act, 1915, the mortgage of July 27, 1928, conferred upon the Association a power of sale in the following terms: "The mortgagee may sell the "mortgaged property, or any part thereof, either altogether "or in lots, by public auction or by private contract, or "partly by the one and partly by the other of such modes of "sale, and subject to such conditions as to title or evidence "of title, time or mode of payment of purchase-money or "otherwise as the mortgagee thinks fit, with power to the "mortgagee to buy in the mortgaged property or any part "thereof at any sale by auction or to rescind any contract "for the sale thereof, and to resell the same without being "answerable for any loss or diminution in price, and with "power to execute assurances, give effectual receipts for the "purchase-money, and do all such other acts and things for "completing the sale as he may think proper: And also that "the mortgagee may exercise such other incidental powers "in that behalf as are conferred upon mortgagees by the "Land Transfer Act, 1915: And, lastly, that the mortgagee "will apply the moneys arising from any such sale as aforesaid, "in the first place in payment of the costs and expenses "incidental to the sale or otherwise incurred in respect of the "mortgage, and in the second place in satisfaction of the "principal interest and other moneys for the time being "owing under the mortgage, and in the third place in payment "of the moneys owing under subsequent registered mortgages "(if any) in the order of their priority; and will pay the "surplus (if any) to the mortgagor."

By an agreement dated May 8, 1929, the power of sale being then exercisable, the Association as mortgagee agreed to sell "Cattle Peaks" to one Little for 15,317*l.* 5*s.* The purchase-money was to be paid as to 2000*l.* on the signing of the agreement; this was duly paid. The sum of 9425*l.* was to be paid by Little assuming liability for the first mortgage of that amount, and the balance of 3892*l.* 5*s.* was to be paid on March 23, 1934. Interest on the unpaid purchase-money was payable by Little at the rate of 9 per cent. per annum. Little was given possession of the land, but no transfer of the property to him was ever effected. The agreement, however, provided that, if Little made default, the Association might re-enter on the land, and (whether it had re-entered or not) resell the land. Little failed to carry out the contract, and the Association rescinded the agreement with Little and sold "Cattle Peaks" to another purchaser, but for a price considerably lower than that payable under the first agreement. The second agreement has been carried to completion, and the land has been vested in the second purchaser. The second purchaser was in fact Little's wife, but nothing turns on this. Neither the propriety nor the validity of that sale is questioned. The Association has credited the plaintiff Wright with all moneys received from Little under the agreement of May 8, 1929, and with the full price for which the property was sold under the second agreement. The plaintiff Wright, however, is not satisfied; he claims that he is not concerned with the second sale, but that he is entitled to be credited with the whole of the price for which the property was contracted to be sold under the first agreement. The first question arising on this appeal is whether that claim is well founded or not.

It is to be observed that in the present case the mortgagee's power of sale authorized a sale "subject to such "conditions as to . . . . time or mode of payment of purchase-"money . . . . as the mortgagee thinks fit," words wide enough to constitute an authority to the mortgagee from the mortgagor to sell on credit. This feature, however, appears to be of no materiality to the point under consideration; its only importance lies in the fact that it makes it impossible for the mortgagor to contend that the contract with Little was in excess of the mortgagee's power. That he does not seek to do; indeed, his whole contention is based upon the view that the contract constituted an effective sale under the power, and that the price payable thereunder must be credited to him by the mortgagee.

Their Lordships agree with both of the Courts in the Dominion in rejecting this claim. They know of no principle, legal or equitable, upon which can rest the proposition that a mortgagee who has contracted to sell in exercise of his power of sale, and who (the land not having become vested in the purchaser) rescinds the contract, is accountable to the mortgagor for purchase-money which he has never received. Authority is against such a proposition. The exact point has been decided, and, their Lordships think, rightly decided, by the Courts in New South Wales: *Irving* v. *Commercial Banking Co. of Sydney*. (1)

The case is patently different from those cases in which it has been held that a mortgagee, who sells upon the terms that part of the purchase price shall remain on mortgage, is accountable to the mortgagor for the whole purchase-money. In such cases the contract has been carried to completion, the property has been vested in the purchaser, and the power of the mortgagor to get back his property freed from the mortgage has been, not merely suspended, but destroyed. The transaction is only consistent with the view that the whole purchase-money was received by the mortgagee in the first instance, and subsequently, as to part, advanced by way of loan to the purchaser.

Moreover, the terms of the power of sale which is here in question negative the existence of the right claimed. The mortgagee's obligation as to the application of the sale moneys is only expressed to exist in relation to "the moneys "arising from any such sale," and moneys which have never

(1) (1897) 19 N. S. W. R. Eq. 54.

been forthcoming cannot be said to "arise" at all. Further, the power includes a power in the mortgagee to rescind and resell "without being answerable for any loss or diminution "of price." Such a provision seems inconsistent with the view that he is answerable for the larger price. Their Lordships feel no doubt that the plaintiff Wright's first contention must fail.

The facts relevant to the second point must now be stated. By a guarantee in writing, dated August 11, 1909, the plaintiff Wright guaranteed to the Association payment by two sheep farmers named Nosworthy, of their indebtedness to the Association in the following terms:—

"In consideration of your supplying goods and making "advances to William Nosworthy and Robert Nosworthy "both of Mt. Somers, sheep farmers, I, Douglas George "Wright of Windermere, sheep farmer, hereby agree with "you as follows:—

"1. To guarantee to you the payment by the said William "Nosworthy and Robert Nosworthy of all goods already "supplied or hereafter supplied by you to them and of "all advances already made or hereafter made by you to "them together with interest thereon at the current rate "charged by you and together with such charges as are "usually made by you.

"2. This guarantee shall be a continuing guarantee and "shall apply to the balance that is now or may at any "time hereafter be owing to you by the said William "Nosworthy and Robert Nosworthy on their current "account with you for goods supplied and advances made "by you as aforesaid and interest and other charges as "aforesaid.

"3. You shall be at liberty without discharging me from "liability hereunder to grant time or other indulgence to "the said William Nosworthy and Robert Nosworthy in "respect of goods supplied and advances made by you to "them and the interest thereon and other charges as "aforesaid and to accept payment from them in cash or "by means of negotiable instruments or otherwise and to "treat them in all respects as though I were jointly liable "with them as a debtor instead of being merely a surety "for them. You shall also be at liberty to take any "securities you may think fit from the said William "Nosworthy and Robert Nosworthy for the purpose of "securing payment of the moneys which I hereby guarantee "to pay and such securities at your own discretion to "release and discharge or otherwise deal with.

"4. In order to give full effect to the provisions of this "guarantee I hereby waive all suretyship and other rights "inconsistent with such provisions and which I might "otherwise be entitled to claim and enforce."

By letter dated April 25, 1931, the plaintiff Wright terminated his said guarantee. The balance due on that date by the Nosworthys to the Association was 11,816*l.* 10*s.* 4*d.* The account was ruled off in the Association's books at that figure, and all subsequent debits and credits to the Nosworthys were entered in a fresh account called the 1.A account. The Nosworthys having made default, the Association counterclaimed in the action for payment by the plaintiff Wright of the said sum of 11,816*l.* 10*s.* 4*d.* with interest thereon. The plaintiff Wright pleaded that the claim was barred by the Limitation Act (21 James I., c. 16) or, in the alternative, by the Statute 3 & 4 Wm. IV., c. 42, his contention being that, upon the authority of the decision in *Parr's Banking Co., Ld.* v. *Yates* (1), his liability as guarantor was barred in respect of each advance made to the Nosworthys on the expiration of six years from the date of the advance. The second question to be decided is whether that contention is sound.

The trial judge held that it was not, and entered judgment for the Association for 13,384*l.* 13*s.* 9*d.* in respect of the guarantee, representing the said sum of 11,816*l.* 10*s.* 4*d.* and interest to judgment, after taking into account a credit existing on the 1.A account. The appeal from that judgment was dismissed.

Their Lordships agree with those decisions. In their opinion the matter is determined by the true construction of

(1) [1898] 2 Q. B. 460; 67 L. J. (Q. B.) 851.

the guarantee, which they proceed to consider, and, in the first instance, apart from authorities. It is no doubt a guarantee that the Association will be repaid by the Nosworthys advances made and to be made to them by the Association together with interest and charges; but it specifies in cl. 2 how that guarantee will operate—namely, that it will apply to (i.e., the guarantor guarantees repayment of) the balance which at any time thereafter is owing by the Nosworthys to the Association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. If that be the true construction of this document, as their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted.

It is said, however, that the decision in the *Parr* case (1) is inconsistent with this view, and excludes its entertainment. In that case there was in terms no guarantee of every debit balance existing from time to time; nor does the clause as to evidence, which appears in the Law Journal report, operate to create such a guarantee. There had been no debits to the account of the guaranteed party, except debits of interest and charges, since December 3, 1890, but payments to its credit had been made down to March or April, 1897, when the guaranteed party disappeared. The writ was issued on September 3, 1897. Counsel for the plaintiff argued that on the true construction of the guarantee it did guarantee payment of whatever was from time to time due on the account of the principal debtor, and that what was sued for was the guaranteed payment of the balance due in 1897. As their Lordships read the judgments, the Court of Appeal refused to accept that construction of the guarantee there in question; they construed it as a guarantee of the repayment

(1) [1898] 2 Q. B. 460; 67 L. J. (Q. B.) 851.

of each individual item debited to the guaranteed party whether in respect of advances, interest, commission or other charges. Thus A. L. Smith L.J. said as to the guarantee that (1) "upon the true construction of it, no advances "having been made for a period of more than six years before "the date of the writ in the action, the plaintiffs' right of "action in respect of the advances is barred by the Statute "of Limitations"; but he held the defendant bound to pay the interest, commission and charges, the repayment of which had also been guaranteed, because they had accrued against the guaranteed party within the six years. Rigby L.J. also rejected the construction which gave a fresh right of action from day to day, in other words, he rejected the construction that the repayment of balances was guaranteed. Vaughan Williams L.J. also rejected that construction in holding that under the guarantee the cause of action arose as to each item, whether principal, interest, commission or other banking charge, as soon as that item became due.

Their Lordships express no opinion whether that particular decision was right or wrong. They would wish to keep that question open for further consideration should the necessity to determine it ever arise. They are, however, satisfied that it has no application to the rights and liabilities of the parties to the guarantee which is under examination on this appeal. That document, in their opinion, clearly guarantees the repayment of each debit balance as constituted from time to time, during the continuance of the guarantee, by the surplus of the total debits over the total credits, and accordingly at the date of the counterclaim the Association's claim against the plaintiff for payment of the unpaid balance due from the Nosworthys, with interest, was not statute-barred. It is not necessary to decide the exact point of time from which the limitation period would commence to run in a case such as this, because no claim was made before their Lordships to alter the amount of the judgment on the guarantee in the event of the contention as to the Statutes of Limitation being unsuccessful.

(1) [1898] 2 Q. B. 464–5.

For the reasons indicated, their Lordships are of opinion, and they will humbly advise His Majesty, that this appeal should be dismissed. The appellants must pay the costs of the appeal.

J. C.
1939
WRIGHT
v.
NEW
ZEALAND
FARMERS
CO-OPERATIVE
ASSOCIATION
OF
CANTERBURY.

Solicitors for appellants: *John Bailey, Le Mesurier, and Watts-Jones.*

Solicitors for respondents: *Gard, Lyell & Co.*

[PRIVY COUNCIL.]

J. C.* MAURICE . . . . APPELLANT;

1939

May 5.

AND

GOLDSBROUGH MORT AND COMPANY, LIMITED . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—Insurance—Wool—Consigned by owner to brokers for sale—Destroyed by fire in brokers' store—Brokers' insurable interest—Full value recoverable from insurer—Apportionment between owner and brokers according to respective interests—Brokers not entitled to retain prospective profits and charges.

Wool consigned by the appellant, a wool grower, to the respondents, wool brokers, for sale by the latter on a commission basis, was insured against loss or damage by fire under policies taken out in their own name by the respondents on "merchandise "the assureds' own property or held by them in trust or on "commission for which they may be liable in the event of loss or "damage by fire." The policies also provided that a claim thereunder should state the amount of the loss or damage "not including profit of any kind." The appellant's wool having been destroyed by fire while lying in the respondents' store:—

Held, that the respondents did not insure the wool as agents for the appellants, but on account of their own insurable interest therein, which arose from their liability to the appellant in case of loss, and they were accordingly entitled to recover in full from the insurer for the insured value of the wool. The policies, however, insured the wool, and did not cover any profits which the respondents might have earned but for the loss, and therefore on an apportionment between the respondents and the appellant according to their respective rights of property in the wool at the date of the fire, the former were not entitled to deduct from the proceeds of the policy payable to the appellant commission which they would have earned and the charges which they would have been entitled to make for receiving, weighing, lotting, valuing, etc., if the wool had not been destroyed by the fire. The respondents' only right was to deduct to the extent of their lien for services actually rendered or expenses paid in connection with the wool before the fire.

MacKenzie v. *Whitworth* (1875) L. R. 1 Ex. D. 36, at p. 43;

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, and LORD ROMER.

North British Insurance Co. v. *Moffatt* (1871) L. R. 7 C. P. 25, and *Waters* v. *Monarch Life Assurance Co.* (1856) 5 El. & Bl. 870, referred to.

Observations in *Ebsworth* v. *Alliance Marine Insurance Co.* (1873) L. R. 8 C. P. 596, at pp. 628, 637, discussed.

Judgment of the High Court of Australia reversed.

APPEAL (No. 78 of 1938), by special leave, from (*a*) a judgment of the High Court of Australia (December 14, 1937), reversing a decision of the Supreme Court of New South Wales upon a Special Case; and (*b*) an order of the Supreme Court of New South Wales (March 10, 1938), ordering judgment to be entered pursuant to the decision of the High Court of Australia.

In September, 1935, the appellant, Thelwall Thomas Maurice, a wool grower, consigned one hundred and twenty-three bales of wool to the respondents, Goldsbrough Mort and Co., Ld., wool brokers, to be sold, and while it was lying in the respondents' store it was destroyed by fire on September 25, 1935. According to the ordinary course of business between the respondents and their clients, the respondents were not only to receive the wool into their store, but were to pay the expense of the road and rail carriage to the store, to prepare the wool for sale by weighing, lotting, valuing it, and so forth, and to sell the wool for a commission payable by the growers to them. The net proceeds of sale after such deductions of charges and expenses were to be paid by the respondents to the growers.

The respondents, in their own name, had insured the appellant's wool. The policy was issued by the Western Assurance Company, and was against loss or damage by fire or lightning of the property described in the schedule. The description in the schedule was "on merchandise the assureds' "own property or held by them in trust or on commission for "which they may be liable in the event of loss or damage by "fire." The policy contained a condition that a claim should be made within fifteen days of loss, stating in particular the amount of loss or damage, having regard to the value of the goods at the time of loss or damage, "not including profit of any kind."

When the fire occurred, the respondents had already expended moneys in respect of the appellant's wool for railage from the station to the store, and for insurance in transit, and had charged for insurance at the rate of 1*s.* 6*d.* per cent., less ten per cent. The amount which the respondents collected on the insurance policies was 1980*l.* 0*s.* 7*d.* In the account which the respondents after the fire rendered to the appellant, however, headed "Account Sales of Realisation by Insurance," they claimed to deduct from the insurance moneys which they had received in respect of the wool two further sums, 24*l.* 15*s.* for commission on sale, and 36*l.* 11*s.* 10*d.* for receiving, weighing, lotting, valuing, etc. Those two further sums were disputed by the appellant on the ground, as to the sale commission, that it had not been, and could not be, earned, and as to the other charges, that they were only deductible from the insurance moneys so far as they were referable to receiving the wool or any other services actually performed.

On May 4, 1936, the appellant brought the action in the Supreme Court of New South Wales claiming the sum of 61*l.* 6*s.* 10*d.* as money had and received by the respondents to his use. By consent of the parties a special case was stated under s. 55 of the Common Law Procedure Act, 1899, for the opinion of the Supreme Court.

The questions for the decision of the Court and the answers of the Supreme Court of New South Wales (Jordan C.J., Halse Rogers and Bavin JJ.) were :—

(1.) Whether the plaintiff has any right to recover the said sum of 24*l.* 15*s.* or any part thereof from the defendants ? Yes, the whole amount.

(2.) Whether the defendants are entitled to deduct or retain the said sum of 24*l.* 15*s.* or any part thereof ? No, no part thereof.

(3.) Whether the plaintiff has any right to recover the said sum of 36*l.* 11*s.* 10*d.* or any part thereof from the defendants ? Yes, so much thereof as is not referable to receiving the wool and any other services actually performed.

(4.) Whether the defendants are entitled to deduct or retain the said sum of 36*l.* 11*s.* 10*d.* or any part thereof ? Yes, so much thereof as is referable to services actually performed.

J. C.
1939
MAURICE
v.
GOLDS-BROUGH
MORT &
CO.

On appeal by the defendants to the High Court of Australia (Starke, Dixon and McTiernan JJ., Latham C.J. and Evatt J. dissenting) the above questions were answered respectively as follows: (1.) No; (2.) Yes; (3.) No; and (4.) Yes, and the decision of the Supreme Court was accordingly reversed.

1939. March 23, 24. *Wilfrid Barton K.C.* and *Kenelm Preedy* for the appellant. The whole question is whether the respondents can make the deductions they claim. So far as the contract between the parties goes, the respondents undertook to procure insurance under an ordinary policy, and such a policy is one which gives the person to be insured a complete indemnity. There is no indication of any intention to cover anything but the appellant's interest, and an insurance effected under the present conditions does not cover the interests claimed by the respondents. The respondents have no greater right, when once they have contracted to cover the goods on behalf of their clients, than they would have had if they had taken out separate independent policies in their clients' names. The respondents were bound to account to the appellant for the insurance moneys received less only charges due and payable to the respondents; the insurance effected was of the appellant's wool, and not of the respondents' prospective profits or charges. The sale commission claimed to be deductible by the respondents was never earned, and could never in the circumstances have become due from the appellant: similarly, the charges claimed by the respondents, except to the extent that they had been earned before the fire, could never be earned. Bailees insuring their principals' goods must account for the insurance moneys less only charges accrued due. By the terms of the policy insurance of profits in any form whatsoever was excluded. [Reference was made to *Cochran & Son* v. *Leckie's Trustee* (1); *Lucena* v. *Craufurd and Others* (2);

(1) (1906) 8 F. 975.
(2) (1806) 2 Bos. & Pul. (N. R.) 269, 278, 324, 329.

Stockdale v. *Dunlop* (1); *Anderson* v. *Morice* (2); *Waters* v. *Monarch Life Assurance Co.* (3); *London and North Western Ry. Co.* v. *Glyn* (4); *North British Insurance Co.* v. *Moffatt* (5); and *Ebsworth* v. *Alliance Marine Insurance Co.* (6)] Evatt J., in his dissenting judgment in the High Court, put the matter in a nutshell when he said: "It is true that serious interference with the brokers' business profit might result from "the fire and this might be regarded by the brokers as a risk. "But the well recognised way of covering all such risks is "by consequential loss policies."

A. T. Miller K.C. and *Hon. H. L. Parker* for the respondents. It is necessary for the proper decision of this case to consider first the question of what was the contract between the brokers and the grower: what was the contract as to insuring the wool? The respondents in effecting the insurance were not acting as agents for the owner. There was no obligation or undertaking of the brokers to insure for the grower; the contract was that they would insure, but in their own name, not as agents, and that in the event of loss they would put the owner in the same position as if the sale had gone through. That would appear to be a possible and reasonable view of the position. All the cases where it has been said that the assured must account to the owner for the balance received by them will apparently be found to have proceeded on the basis that there had been an intention to insure on the part of the owner, or it had been effected in such circumstances that the owner had been able to say that he recognized that insurance. And unless the case is one in which the owner can be said to ratify the insurance as made on his behalf it is open to the assured to say that a claim for money had and received will not lie. There was a ratification relied upon in *Waters* v. *Monarch Life Assurance Co.* (3) In the present case the respondents' policy was in terms referable only to the interest of the brokers: *Routh* v. *Thompson*. (7)

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(1) (1840) 6 M. & W. 224, 226, 232.

(2) (1875) L. R. 10 C. P. 609.

(3) (1856) 5 El. & Bl. 870, 881.

(4) (1859) 1 El. & El. 652, 660.

(5) (1871) L. R. 7 C. P. 25.

(6) (1873) L. R. 8 C. P. 596, 608.

(7) (1809) 11 East 428; (1811) 13 East 274.

J. C.
1939
MAURICE
v.
GOLDSBROUGH
MORT &
CO.

The next point is, what is covered by a policy on merchandise? It is not necessary to disclose the nature of the insurable interest where the subject-matter is described sufficiently: *Crowley* v. *Cohen.* (1) [Reference was also made to *MacKenzie* v. *Whitworth* (2), and to Welford and Otter-Barry's Fire Insurance, 1st ed. (1911), p. 30, s. 5, dealing with "When the Interest must be Specified."] In the present case the brokers have lost the value of their interest; the policy on merchandise covered not only the brokers' lien, but the other elements of insurable interest. They had been engaged to work in connection with the goods, and their obligation to the appellant was limited to paying him such sum as the appellant would have received had the goods been sold at the date of the fire. The respondents were entitled to retain out of the proceeds of insurance sufficient to recoup themselves for their entire loss, including prospective commissions and charges: they are entitled to prove their interest whatever it may be.

Assuming, however, that the case must be approached from an entirely different angle, and it must be accepted that the only question is what has the insurance to be cut down to, the position is covered by the law as stated in *Ebsworth* v. *Alliance Marine Insurance Co.* (3), and reliance is placed on the passage in that case to the effect that the plaintiff's insurable interest was to the extent of their advance "and their expenses and expected commission." (4) That case furnishes the most reliable guide to the problems presented by the present case. Lastly, in *De Forest* v. *Fulton Fire Insurance Co.* (5), an American case, it was said: "It is "admitted that they had an interest in the goods they held "on commission, and are entitled to recover to the amount "of their advances thereon, with interest, and their mercantile "commissions and charges as factors." The majority decision of the High Court is right.

(1) (1832) 3 B. & Ad. 478, 485.
(2) (1875) L. R. 1 Ex. D. 36, 41.
(3) (1873) L. R. 8 C. P. 596, 607–8, 628–9, 637.
(4) Ibid. 637.
(5) (1828) N. Y. Rep., 1 Hall, 94, 113.

J. C.
1939
MAURICE
v.
GOLDSBROUGH
MORT &
CO.

Wilfrid Barton K.C. replied. No question as to commission was raised in *Ebsworth* v. *Alliance Marine Insurance Co.* (1), while in *De Forest* v. *Fulton Fire Insurance Co.* (2) there was an admission that commission could be deducted, and the Court dealt with the case on the basis of that admission.

May 5. The judgment of their Lordships was delivered by LORD WRIGHT. The question in this appeal is what are the rights of the appellant, as wool grower, and the respondents, as wool brokers, in respect of moneys collected by the brokers under insurance policies effected by them on the appellant's wool, which the respondents held in their store at the time when it was destroyed by fire. The respondents as brokers claim to make certain deductions, partly for expenses incurred and services rendered before the fire, and partly for prospective profits, such as commission on sale, lost by them in consequence of the fire, and for charges or expenses which, but for the fire, would have been earned or expended and would have been deductible from the proceeds, if the wool had been sold in the normal course, instead of being destroyed.

The facts are set out in a special case, to which are appended certain questions for the opinion of the Court. The Supreme Court of New South Wales answered these questions in the appellant's favour. That decision was reversed by the High Court of Australia by a majority, Latham C.J. and Evatt J. dissenting.

The wool in question, 123 bales in all, was consigned by the appellant to the respondents during September, 1935, and was lying in the respondents' store when it was destroyed by fire on September 25, 1935. According to the ordinary course of business between the respondents and their clients the respondents were not only to receive the wool into their store, but were to pay the expense of the road and rail carriage to the store, to prepare the wool for sale by weighing, lotting, valuing it, and so forth, and to sell the wool for a commission payable by the growers to the respondents. The net proceeds of sale after such deductions of charges and expenses were to be paid by the respondents to the growers. The special case does not in terms say that the respondents were bound to insure the wool, but it is clear, and has been assumed throughout these proceedings, that there was this obligation. The case states that the respondents, in their own name, had insured the appellant's wool and the wool of other clients charging a flat rate of 1*s.* 6*d.* per cent. to the growers. This charge was not based on the actual rate payable under the policies to the insurance companies. A specimen of the ordinary policies effected by the respondents was appended to the case. It was issued by the Western Assurance Company in favour of the respondents as the insured for the sum of 5000*l.* for one year, and was against loss or damage by fire or lightning of the property described in the schedule. The description in the schedule was " on merchandise the assureds' "own property or held by them in trust or on commission "for which they may be liable in the event of loss or damage "by fire," while lying in the respondents' store in Sydney. The course of business followed by the respondents in these insurances was not to cover specifically any particular lot or lots of wool, but to have a number of policies each for a lump sum, covering all the wool which the respondents held from time to time, the total cover being reduced or diminished according to requirements at the close of each day. The total amount of the insurance was divided by mutual arrangement between the Western Assurance Company and other companies, by way of direct insurance, and not by way of reinsurance.

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(1) L. R. 8 C. P. 596.

(2) 1 Hall, 94.

When the fire occurred, the respondents had expended moneys in respect of the appellant's wool for railage from the station to the store and for insurance in transit, and had charged for insurance at the rate 1*s.* 6*d.* per cent., less 10 per cent. But in the account which the respondents after the fire rendered to the appellant, headed " Account Sales of "Realisation by Insurance," they claimed to deduct from the insurance moneys which they had received in respect of the wool two further sums, 24*l.* 15*s.* for commission on sale, and 36*l.* 11*s.* 10*d.* for receiving, weighing, lotting, appraising value, etc. These two further sums were disputed by the appellant on the ground, as to the sale commission, that it had not been and could not be earned, and as to the other charges, that they were only deductible from the insurance moneys, so far as they were referable to receiving the wool or any other services actually performed. This view was accepted by the Supreme Court. The amount which the respondents collected on the insurance policies was 1980*l.* 0*s.* 7*d.*, which was the figure as estimated by appraisers appointed for the purpose of appraising and valuing the wool, as on the basis of the gross selling price realizable by auction at the date of the fire. The issue in the action was as to the deductions which the respondents were entitled to make from the insurance moneys in settling with the appellant.

The policy contained a usual reinstatement clause, and also made it a condition that a claim should be made within fifteen days of loss, stating in particular the amount of loss or damage, having regard to the value of the goods at the time of loss or damage " not including profit of any kind."

It is convenient first to determine what is the position between the respondents as insured and the Western Assurance Company as insurers. What that is must depend on the contractual terms embodied in the policies. That the wool was covered by the policies was not in dispute, though there had been no appropriation of the particular parcels as between any of the lump sum or block policies. The sample policy, exhibited to the special case, defines the scope of the insurance. It is necessary, however, in examining the policy to distinguish between the subject-matter which is insured and the assured's interest in the subject-matter. The subject-matter, for the purposes of the present policy, is the merchandise, that is, the wool, which is insured against the risk of physical loss or damage by fire. But while the subject-matter of the insurance is the chattel, the basis of the insurance is that the assured stands in such relation to the chattel that he may be prejudiced by its loss or damage, in accordance with the various principles which have been settled for regulating what constitutes insurable interest. The subject-matter of an insurance must be properly described. Thus, if the subject-matter is a ship, the policy must so describe it, and, conversely, if it is freight which is insured, that must be so described as the subject-matter of the insurance. Similarly by English law at least, an insurance described as an insurance on goods, does not cover profits. "*Lucena* v. "*Craufurd and Others* (1) has always been treated as deciding "that, though profits may be insured, they must be described "as such, and we took time in this case, principally with a "view to see what were the reasons for this decision, and "whether they were applicable to such a case as the present." This is a quotation from the judgment of Lord Cairns L.C., Blackburn and Brett JJ., in *MacKenzie* v. *Whitworth*. (2) The policy there was a policy of reinsurance; the subject-matter was the ship, which was properly defined; it was held to be unnecessary to define the nature of the assured's interest. The contract was a contract by way of reinsurance. The assured's liability under the original policy gave him an insurable interest in the ship, which was the subject-matter of the insurance. The contract was to indemnify the reassured against all the damage sustained by the ship in consequence of any of the perils insured against, his interest being that he was himself liable to indemnify the original assured. In the policy here in question the subject-matter is described as merchandise, and the condition quoted above specifically states that the insured value is not to include profits of any kind. Hence it is the wool, not any profits, which the policy insures. But the policy also describes the interest of the assured, which is covered as being the assured's own property in the wool, and also wool held by the respondents in trust or on commission for which they may be liable in the event of loss or damage by fire while lying in the specified stores. That form of cover for the use of warehousemen and other bailees has long been familiar. Its history was discussed in *North British Insurance Co.* v. *Moffatt*. (3) It was there stated in the judgment of the Court that *Waters* v. *Monarch*

(1) 2 Bos. & Pul. (N. R.) 269.
(2) L. R. 1 Ex. D. 36, 43.
(3) L. R. 7 C. P. 25.

Life Assurance Co. (1) and *London and North Western Ry. Co.* v. *Glyn* (2) were cases in which (3): ". . . . goods held by "the plaintiffs as bailees were insured by them under policies "the conditions of which provided that goods held in trust "would not be covered by the policies unless they were "insured as such. The goods accordingly were insured "expressly as goods held in trust by the assured. The offices "contended, that as the plaintiffs, as bailees, had no insurable "interest in the goods beyond their liens respectively, they "could only recover to the amount of such liens. But the "Court held in each case that the plaintiffs were entitled to "recover to the full amount insured, and intimated that "the excess beyond the personal interest of the assured "would probably be held in trust for the parties really "interested, though unaware of the insurance having been "effected."

After this insurance companies limited, as in the present policy, the extent of the risk they were taking. A warehouseman who has assumed the obligation to insure the goods while in his possession has an insurable interest, because he will be bound to answer in damages to the bailor if he has not insured and the goods have been destroyed or damaged, though apart from the special contract the warehouseman would not be responsible in respect of goods accidentally destroyed or damaged by fire while in his warehouse. So far as concerns the respondents' claim against the insurers, there was no need to distinguish between the respective interests of the appellant and respondents in the wool. The respondents were entitled to recover in full from the insurer for the insured value of the wool, which was determined by appraisement in accordance with the policy as being 1980*l.* 0*s.* 7*d.*, as stated above. The correctness of that appraisement being accepted by all parties, the position is for practical purposes the same as if the wool had been originally valued at that figure in the policy. The respondents did not insure as agents for the appellant. They insured the subject-matter, the wool, on account of their own insurable interest in that subject-matter.

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(1) 5 El. & Bl. 870.
(2) 1 El. & El. 652.
(3) L. R. 7 C. P. 31.

The respondents have not disputed the right of the appellant to claim from the respondents an account of the moneys collected under the policy. The dispute, as already stated, is as to what share of these moneys the respondents are entitled to retain. One possible view, suggested by Evatt J., is that as the respondents have agreed to insure the appellant's wool, the appellant is entitled to the whole of the moneys collected on the policy, though the respondents are entitled to set off, simply as a debt, whatever may be due to them from the appellant. The special case, however, does not set out the bargain as to insurance, and that way of looking at the matter may be disregarded, especially as in their Lordships' opinion, for reasons to be stated, it would in this case make no practical difference. The appellant rests his case on the ground that the respondents are not entitled to deduct any part of the proceeds of the policy, except to the extent that at the date of the fire they had a lien for services rendered or expenses paid. On the other hand, the respondents claim that they are also entitled to deduct the commission which they would have earned and the charges which they would have been entitled to make for receiving, weighing, lotting, valuing, etc., just as if the wool had not been destroyed by the fire. They claim that these are profits which they have lost by the fire, and that they had an insurable interest in these profits. That they had an insurable interest in their prospective profits on the wool in store may be conceded. But it was an insurable interest in a different subject-matter, namely, in profits, and not in the wool itself. The policy, as already stated, did not insure profits. If the respondents had desired to insure profits, they might have insured them by an insurance on the profits so described. Perhaps they did, though whether they did or not is immaterial. In a policy such as this on merchandise, the right to recover must be based on an insurable interest in the goods themselves, whether a special property like a lien, or the general property, or some other insurable interest, such as liability in case of loss of the goods. The position of the warehousemen is well stated by Crompton J. in *Waters'* case (1): "I cannot entertain the "least doubt that in these policies the words 'in trust' are "used without any reference to a subpœna in Chancery. "The parties meant to insure those goods with which the "plaintiffs were entrusted, and in every part of which they "had an interest, both in respect of the lien and in respect "of their responsibility to their bailors. What the surplus "after satisfying their own claim might be, could only be "ascertained after the loss, when the amount of their lien at "that time was determined; but they were persons interested "in every particle of the goods." Wightman J. says (2): "They "[s.c., the bailees] had a lien on them [s.c., the goods], "subject to which they were accountable to the owners who "had entrusted them with the goods."

These learned judges are upholding the right of the assured to recover the whole value from the insurers, because of their insurable interest either on the ground of lien or responsibility, the apportionment of what is recovered being left to be settled between bailor and bailee, the bailees' interest being defined by their lien. That this is so in the present case is also confirmed by the terms of the policy, which insures the wool so far as it is the assured's own property, that is to the extent of their lien or special property, and as to the residue refers to the property as held on trust. In effect, in a policy of this nature the policy moneys represent the goods when the goods are destroyed by fire, and the rights in these moneys are apportionable according to the respective interests or property rights in the goods themselves.

The respondents, however, strongly relied on certain observations in *Ebsworth* v. *Alliance Marine Insurance Co.* (3) In that case the plaintiffs claimed on a policy on cotton from Bombay to London. The cotton was totally lost by sea perils. The plaintiffs were consignees for sale, and had advanced 3000*l.*

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(1) 5 El. & Bl. 870, 882.
(2) Ibid. 881.
(3) L. R. 8 C. P. 596.

on the security of the cotton, but had insured the whole value, which was 5000*l.* The jury found a verdict for 5000*l.*, subject to leave reserved to reduce the damages to 3000*l.* in the event of the Court being of opinion that the interest proved, and the plaintiffs' right to recover, was limited to 3000*l.* The Court was equally divided, Bovill C.J. and Denman J. being of opinion that the verdict was right, the plaintiffs not being limited to their own beneficial interest in the goods, Keating and Brett JJ. being of opinion that the plaintiffs were not entitled to recover anything beyond 3000*l.*, being their actual advance. As the Court was equally divided, the case was inconclusive, and does not become less so when it is remembered, as is recorded in a note on the case, set out in 43 L. J., C. P. 394, that when the case came to the Exchequer Chamber, the parties by arrangement agreed that the judgment should be reversed and the damages entered for the plaintiffs should be reduced to a sum representing the personal pecuniary interest of the plaintiffs and no other person. How this arrangement came to be made does not appear, nor does it appear how the personal pecuniary interest of the plaintiffs was assessed.

It is clear, however, that no question was raised in the case whether the plaintiffs could recover anything beyond their advances, if they were limited to their own beneficial interest. Mr. Miller, however, strongly relied on a passage in the judgment of Keating and Brett JJ. (1): "The next "question is, what was the amount of the plaintiffs' insurable "interest. If they had any, it would seem to be at least to "the extent of 3000*l.*, their advance, and their expenses and "expected commission." But, as the report shows, the only contest was whether they were to recover 3000*l.* or 5000*l.* Indeed, two years before, Brett and Keating JJ., along with Willes J., had in *Moffatt's* case (2) treated the parties' personal interest as limited to their liens on the goods. Mr. Miller also relied on a passage from the judgment of Bovill C.J. and Denman J. in *Ebsworth's* case (3) quoting from Parsons on

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(1) L. R. 8 C. P. 637.

(2) L. R. 7 C. P. 25.

(3) L. R. 8 C. P. 596, 628.

Insurance, ed. 1868, at p. 50, to the effect that the bailee can recover not only to the extent of his lien for charges, commission, etc., but to the full value of the goods, and the balance will be held in trust for the owner of the goods. This cannot mean that he will recover beyond the full value by adding to it charges and commission, but in any case, the statement is expressly limited to liens. Again at p. 201 the same author is quoted to the same effect. Reference was also made to a case in the New York Court, *De Forest* v. *Fulton Fire Insurance Co.* (1), where the allowance not only of the bailee's advances, but also of mercantile commission and charges was only based on an admission, and was not the subject of decision. Their Lordships find it impossible to recognize these citations as outweighing the authorities quoted above, or as overriding the terms of the policy in this particular case. In America, it seems to have been held in certain cases that a policy on property might cover a right to a certain share in a cargo as profits. But Phillips on Insurance, ed. 1867, vol. i., s. 462, states that "an insurance "on ship or goods specifically, without any indication that "another subject is intended, cannot be applied to expected "profits." Arnould on Marine Insurance, 12th ed. (1939), vol. i., s. 241, stated the English rule in the same terms. In their Lordships' opinion the policy in question here does not cover profits.

It was contended by the respondents, however, that the decision of the Supreme Court of New South Wales would infringe the principle of indemnity, which is the fundamental principle of insurance law. It was said that the appellant was awarded by that decision more than an indemnity, because he got the gross selling value of the goods, whereas, if the goods had not been lost by the fire, the appellant would have received no more than the net proceeds, after deduction of the respondents' charges and commission. There are many answers to this objection. In the first place, insurance does not necessarily give a perfect indemnity, but gives sometimes more and sometimes less. This may happen

(1) (1828) N. Y. Rep., 1 Hall, 94.

in several cases, but particularly in the case of a valued policy, where the measure of indemnity is fixed by the value, which is in effect the position under the present policy, as already pointed out. In fact, if there had been no fire, but the wool had been sold in the usual course, the amounts realized might have been either greater or less than the appraisement made actually as at the date of the fire. Again, if it is said that the respondents have by reason of the fire lost their commission and charges without being indemnified, the answer is that the policy provided no indemnity for that loss. It is outside the purview of this insurance. Further, if it is said that the appellant gets a sum for the goods which includes the value of the brokers' services for which they have not paid, but without paying which they could not have realized the selling price by an actual sale, the answer is that what the policy covers is the agreed value of the wool, and it is immaterial what costs, whether of production or marketing, go into that value. Thus, for instance, the appraised value is not affected by considering that one lot may have cost more to produce than another. The position, in the event of the loss, must depend on the terms of the contract and on the value as appraised as determined by the terms of the contract, and similarly the apportionment of that value between the appellant and the respondents must depend on the respective rights of property which the parties had in the wool at the date of the fire.

In the result, their Lordships are of opinion that the appeal should be allowed and the judgment of the Supreme Court of New South Wales, dated March 9, 1937, should be restored. The appellant will have the costs of this appeal and also his costs in the Courts in Australia.

They will humbly so advise His Majesty.

Solicitors for appellant: *Waterhouse & Co.*

Solicitors for respondents: *Linklaters & Paines.*

Referred to. A.-G. FOR SASKATCHEWAN *v.* A.-G. FOR CANADA. [1949] A. C. 110

[PRIVY COUNCIL.]

J. C.*

1939

May 8.

LADORE AND OTHERS . . . . APPELLANTS;

AND

BENNETT AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Municipalities—Default in debenture issue—Financial difficulties—Statutory amalgamation of four municipalities—Scheme to meet debenture and other indebtedness—Validity of Amalgamating Acts and scheme—Relative to municipal institutions in the Province—Within legislative competence of Provincial Legislature—City of Windsor (Amalgamation) Act, S. O., 1935, *c.* 74—*City of Windsor (Amalgamation) Amendment Act, S. O.,* 1936, *c.* 66—*Ontario Municipal Board Act, S. O.,* 1932, *c.* 27, *and* 1935, *c.* 51, *Part VI.—Department of Municipal Affairs Act, S. O.,* 1935, *c.* 16, *Part III.—British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91 (19.), (21.); *s.* 92 (8.).

By the City of Windsor (Amalgamation) Act, 1935, of the Ontario Provincial Legislature, four adjoining municipalities which were in financial difficulties and unable to meet their debenture interest and maturing principal, part of which was payable outside the Province, were amalgamated and incorporated as the City of Windsor, and by the City of Windsor (Amalgamation) Amendment Act, 1936, the Windsor Finance Commission, constituted under the principal Act with interim powers of administering the affairs of the new city, was abolished and its duties transferred to the Department of Municipal Affairs for Ontario. By the provisions of Part III. of the Department of Municipal Affairs Act, 1935, which was applied by the Amalgamation Act of 1935 to the new city and its affairs, and which reproduced the provisions, repealed in 1935, of Part VI. of the Ontario Municipal Board Act, 1932, the Ontario Municipal Board, if satisfied (inter alia) that a municipality had failed to meet its debentures or interest when due owing to financial difficulties affecting the municipality, was given power (inter alia) to order terms, conditions, places and times for exchange of new debentures for outstanding debentures, and to order postponement of or variation in the terms, times and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness and interest thereon, and variation in the rates of such interest. A scheme having been formulated pursuant to those powers, and approved by the Ontario Municipal Board, for funding and refunding the debts of the amalgamated municipalities, under which (inter alia) former creditors of the old

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, and LORD ROMER.

J. C.
1939
LADORE
v.
BENNETT.

independent municipalities received debentures of the new city of equal nominal amount to those formerly held, but with the interest scaled down in various classes of debentures :—

Held, that both the Amalgamation Acts and the Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, were in pith and substance Acts passed in relation to "municipal institutions in the Province," and as such they, and the scheme formulated and approved thereunder, were intra vires of the Provincial Legislature under s. 92 (8.) of the British North America Act, 1867. The Provincial legislation in question did not encroach upon the exclusive legislative power of the Dominion Parliament in relation to bankruptcy and insolvency, interest, or private rights outside the Province. The Statutes were not directed to insolvency legislation ; they picked out insolvency as one reason for dealing in a particular way with unsuccessful institutions ; and though they affected rights outside the Province they only did so collaterally, as a necessary incident to their lawful powers of good government within the Province.

Judgment of the Court of Appeal for Ontario [1938] O. R. (C. A.) 324 ; [1938] 3 D. L. R. 212, affirmed.

APPEAL (No. 103 of 1938) from a judgment of the Court of Appeal for Ontario (May 17, 1938) affirming a judgment of Hogg J. (July 26, 1937).

The questions raised by this appeal by the plaintiffs arose out of the affairs of four adjoining municipalities in the Province of Ontario—the city of Windsor, the city of East Windsor, the town of Sandwich and the town of Walkerville. Before 1935 they were each an independent municipality exercising local government over their inhabitants. They had each of them raised loans for local purposes, amounting in the aggregate to many millions of dollars, which were represented by debentures. Those debentures were simple acknowledgments of debt and gave no charge upon municipal property. In the case of East Windsor some of them were made payable outside the Province of Ontario. By 1935 financial difficulties of the municipalities had become acute, and between October, 1931, and December, 1934, they had defaulted in payment of debenture interest and maturing principal. In December, 1934, by Order in Council a Royal Commission was appointed to inquire into the municipal and other local affairs of the four municipalities in question, particularly with regard to acts to be done and steps to be taken in connection with their amalgamation. The Commission reported in April, 1935, and their report disclosed a serious financial position, and something like a total default was threatened.

With the materials in that report before them, the Government of the Province promoted in the Legislature an Act to amalgamate the four municipalities, c. 74 of 1935. The Act amalgamated them into one municipality, which was incorporated under the name of The Corporation of the City of Windsor. As from a named date the existing municipal corporations were dissolved. A special body, entitled the Windsor Finance Commission, was constituted, with interim powers of administering the affairs of the new city. By s. 6, sub-s. 1, of the Act, the Commission was to have and exercise the same rights, authorities, powers and duties as by the provisions of Part III. of the Department of Municipal Affairs Act, 1935, were conferred upon that department, and the provisions of Part III. were to apply to the new city. By the provisions of Part III. the Ontario Municipal Board, if satisfied (inter alia) that a municipality had failed to meet its debentures or interest when due owing to financial difficulties, was given power (inter alia) to order postponement of or variation in the terms, time and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness, and interest thereon, and variation in the rates of interest.

The Finance Commission by s. 7 (*c*) of the Amalgamation Act were to undertake the preparation and submission of a plan for funding and refunding the debts of the amalgamated municipalities upon the general basis that the debt of each of the amalgamated municipalities should be discharged by the imposition of rates upon the rateable property in that area of the new city which formerly comprised such municipality. In pursuance of the Act the Finance Commission prepared a plan for submission to the Ontario Municipal Board. In 1936, however, an amending Act was passed, which did away with the Windsor Finance Commission and transferred its duties to the Department of Municipal

Affairs for Ontario. The plan prepared by the Finance Commission for funding and refunding the debt was taken under consideration by the Municipal Board. The scheme, generally, provided that former creditors should receive debentures of the new city of equal nominal amount to those formerly held, but the interest was scaled down in various classes of debentures. Arrears of interest were dealt with by paying a composition in cash.

On April 29, 1936, the appellants, Edgar F. Ladore, Burley W. Bennett, Horace W. Cunningham and Harrie R. Dingwall, suing on their own behalf and on behalf of all other ratepayers and holders of debentures of the Town of Walkerville and of the Walkerville–East Windsor Water Commission, and on behalf of holders of debentures of other utilities commissions associated with the former municipalities, instituted the action out of which this appeal arose. The defendants were the members of the Finance Commission, the four municipal corporations which were amalgamated, the various Water and Hydro-Electric Commissions of those municipalities, the new Corporation of the City of Windsor, the Windsor Utilities Commission, and the Attorney-General for the Province of Ontario. The plaintiffs claimed (inter alia) a declaration that the Amalgamation Acts were ultra vires of the Provincial Legislature; that the corporation created in pursuance of those Acts was not valid or subsisting; and a declaration that parts of the Ontario Municipal Board Act, 1932, and of the Department of Municipal Affairs Act, 1935, and amendments thereto, were also ultra vires. The relevant statutory provisions appear from the judgment of the Judicial Committee.

The trial judge (Hogg J.) dismissed the action, and his decision was affirmed by the Court of Appeal for Ontario (Latchford C.J.A., Masten and Henderson JJ.A.). The appeal is reported at [1938] O. R. (C. A.) 324; [1938] 3 D. L. R. 212.

1939. March 20, 21. *M. L. Gordon K.C.* and *Charles Sale* for the appellants. The City of Windsor (Amalgamation) Act, 1935, is somewhat ambiguous, but under it the new city which was created became, it is contended, responsible for all the debts of the former municipalities. The Windsor Finance Commission set up under that Act was to formulate a plan for refunding the debts of those municipalities, and one of the things which the Ontario Municipal Board (which superseded the Finance Commission pursuant to the provisions of the City of Windsor (Amalgamation) Amendment Act, 1936) could do under Part III. of the Department of Municipal Affairs Act, 1935, which Part was by the Amalgamation Act applied to the new city, was, in the case of a municipality, to cancel all the debentures which had been issued and replace them by other debentures bearing another rate of interest. Under what has been done in the present case interest has been cut down from six to one-and-a-half per cent. The first ground of the appellants' case against Part III. of the Department of Municipal Affairs Act, 1935, is that ss. 25, 31, 32, 33, 35 and 57 empower the Ontario Municipal Board and the Department of Municipal Affairs to override the provisions of the Dominion Interest Act (R. S. C., 1927, c. 102), which by s. 2 provides that: "Except "as otherwise provided by this or by any other Act of the "Parliament of Canada, any person may stipulate for, allow "and exact, on any contract or agreement whatsoever, any "rate of interest or discount which is agreed upon." Every debenture issued by a municipal corporation or any of its local boards is a contract with the holder thereof to pay interest at the rate set out therein, and accordingly s. 2 of the Interest Act governs such interest stipulation. Sect. 33 of the Department of Municipal Affairs Act allows the exaction of only such rate of interest as the Ontario Municipal Board may authorize, but under head 19 of s. 91 of the British North America Act, 1867, the subject "interest" is within the exclusive legislative competence of the Dominion Parliament. All the provisions of Part III. of the Department of Municipal Affairs Act which deal with or authorize or empower the dealing or interference with agreed rates of interest are ultra vires the Provincial Legislature. The real matter to be decided is whether it can be said that, because the Provincial

Legislature have the power under s. 92 (8.) of the British North America Act to deal with municipal institutions in the Province, they have the power to go right into s. 91 and deal with everything in that section; the question is whether the Ontario Legislature had power to authorize the refunding and reduction of interest, or whether it was only a Dominion concern. Questions of interest are specifically reserved to the Dominion Government. Sect. 33 (*g*) of the Department of Municipal Affairs Act, 1935, and the scheme, strike only at interest, and should be declared ultra vires. Every case, except one, which has been decided in Canada from the date of confederation has said that the Provincial Government have no power to deal with interest at all. If the power of dealing with interest is reserved for the Dominion Government, it is submitted that the Provincial Legislature cannot, by dissolving a municipality and creating another, change the rate of interest on the previously existing debentures. [Reference was made to *Royal Trust Co.* (*Shell Estate*) v. *Attorney-General for Alberta.* (1)]

Under the scheme the municipality have secured what is equivalent to a release from bankruptcy, because the former debentures have been cancelled. The whole scheme of legislation is ultra vires as being bankruptcy legislation, which by head 21 of s. 91 of the British North America Act is reserved exclusively to the Dominion Parliament. Where a Provincial Government incorporates a company, and the same would apply to municipal institutions, the body corporate will be subject to the law of the land—to the Dominion law and the Provincial law: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2); but the right of the Province to legislate in regard to municipal institutions in the Province does not permit them to legislate in regard to any of the specific things reserved to the Dominion Legislature in s. 91 of the British North America Act: this was a dealing with municipal institutions in connection with bankruptcy and insolvency, and therefore outside Provincial powers. Part III. of the Department of Municipal Affairs Act, 1935, is bankruptcy

(1) [1937] 1 W. W. R. 376, 382.

(2) [1896] A. C. 348.

J. C.
1939
LADORE
v.
BENNETT.

legislation, and is almost identical with other Acts passed by the Dominion Government which have been declared intra vires: to be valid the Act in question should have been passed by the Dominion Parliament. The fact that the Dominion has not legislated on this point cannot be considered by the Board: *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia.* (1) The Province, in exercising its powers under s. 92 of the British North America Act, cannot encroach on the powers given by s. 91 to the Dominion: *Valin* v. *Langlois* (2); *Tennant* v. *Union Bank of Canada* (3); *John Deere Plow Co., Ld.* v. *Wharton* (4); and *Proprietary Articles Trade Association* v. *Attorney-General for Canada.* (5) The Province cannot, by dealing with two subjects in one Act, obtain jurisdiction because one subject may be within their jurisdiction and the other without it: *Attorney-General for British Columbia* v. *Attorney-General for Canada.* (6)

The legislation in question deals with rights outside the Province—trade and commerce, bills and notes, and other matters, which are all reserved for the Dominion: *Royal Bank of Canada* v. *Rex.* (7) The Province cannot do indirectly what it cannot do directly: if the object of destroying or dissolving the corporation the Province has created is to affect matters outside the Province, it is outside the Provincial powers. If the result of the dissolution of the corporation materially affects rights outside the Province, it would be a question of degree whether the Province in dissolving the corporation had the question of those rights in mind as one of the objects to be effected: *Royal Bank of Canada* v. *Rex* (7); *Ottawa Valley Power Co.* v. *Hydro-Electric Power Commission*(8); *Beauharnois Light, Heat and Power Co., Ld.* v. *Hydro-Electric Power Commission of Ontario* (9); *Crédit Foncier Franco-Canadien* v. *Ross and Attorney-General for Alberta* (10); and

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(1) [1898] A. C. 700, 714–5.
(2) (1879) 5 App. Cas. 115.
(3) [1894] A. C. 31, 45.
(4) [1915] A. C. 330, 337.
(5) [1931] A. C. 310.
(6) [1937] A. C. 377, 389.
(7) [1913] A. C. 115.
(8) [1937] O. R. 265, 310, 329, 332.
(9) [1937] O. R. 796, 814–5, 821.
(10) [1937] 2 W. W. R. 353.

J. C.
1939
LADORE
v.
BENNETT.

Independent Order of Foresters v. *Rex.* (1) The Province, for the purpose of discharging debts due outside the Province, cannot dissolve the corporation: a company incorporated in the Province may do business outside: *Bonanza Creek Gold Mining Co., Ld.* v. *Rex.* (2)

Interest, bankruptcy and insolvency, and rights outside the Province are matters absolutely excluded from the powers conferred on the Provincial Legislature by s. 92 of the British North America Act, 1867.

Charles Sale followed. In determining whether a municipality is subject to Part III. of the Department of Municipal Affairs Act, 1935, and, in effect, whether or not it is insolvent, the Municipal Board is exercising judicial functions, and it has no power to do so: *Toronto Corporation* v. *York Corporation.* (3) Similarly, in determining an application with respect to indebtedness they are exercising the same functions. [On the question of the costs of the Crown reference was made to *Beauharnois Light, Heat and Power Co., Ld.* v. *Hydro-Electric Power Commission of Ontario.* (4)]

J. H. Rodd K.C. for the respondents the Windsor Finance Commission, the City of Windsor and the Windsor Utilities Commission, and *J. C. McRuer K.C.* for the Attorney-General for Ontario were not called upon to argue.

May 8. The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal from a decision of the Court of Appeal of Ontario affirming a decision of Hogg J., who dismissed the plaintiffs' action. The plaintiffs' claim was for a declaration that two statutes of Ontario providing for the amalgamation of certain municipalities in Ontario were ultra vires the Legislature of Ontario, and that the corporations created in pursuance of those statutes were not valid or subsisting, and a declaration that parts of other Ontario statutes, namely, the Ontario Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, and amendments thereto, were also ultra vires. The plaintiffs also claimed further and alternative relief. The questions raised in the case arise out of the affairs of four adjoining municipalities, the city of Windsor, the city of East Windsor, the town of Sandwich and the town of Walkerville. Before the year 1935 they were each an independent municipality exercising local government over their inhabitants. They had each of them raised loans for local purposes, amounting in the aggregate to many millions of dollars, which were represented by debentures. These debentures were simple acknowledgments of debt and gave no charge upon municipal property. In the case of East Windsor some of them were made payable outside the Province of Ontario, that is to say, in Montreal, in the Province of Quebec, and in New York. Large amounts were held by holders resident outside the Province. Closely associated with the affairs of the municipalities were various public utility corporations, the Walkerville–East Windsor Water Commission, the Walkerville Hydro-Electric Commission, and the Essex Borders Utilities Commission, whose functions need not be particularly described. They had each issued debentures which, in the case of the Essex Borders Utilities Commission and of the Walkerville–East Windsor Water Commission, for instance, purported to create a charge upon properties named therein. These debentures were in many cases held by persons resident outside the Province. These commissions had all been incorporated pursuant to statutes of the Ontario Legislature. By 1935 financial difficulties of these municipalities and their commissions had become acute. In October, 1931, East Windsor defaulted in payment of debenture interest and maturing principal. In March and December, 1932, they were followed by Sandwich and the city of Windsor, and in December, 1934, by Walkerville. Meanwhile, in 1933, the Essex Borders Commission had defaulted, while in June, 1936, the Walkerville–East Windsor Water Commission stopped payment of interest. In December, 1934, by Order in Council, a Royal Commission was appointed to inquire into the municipal and other local affairs of the four municipalities in question, particularly with regard to acts to be done and steps to be taken in connection with their amalgamation. The Commission reported in April, 1935. In the Courts in Canada the report, when tendered in evidence by the plaintiffs, was objected to by the defendants, and the objection was upheld. Before the Board the objection was withdrawn, and by consent of both parties the report was placed before their Lordships. The report disclosed a serious financial position. Commercial conditions had so changed in recent years that, in 1934, 29 per cent. of the total population was, on a daily average, in receipt of relief. Assessments had fallen in value by 38 per cent. of the peak value in 1930; taxation was at breaking point, and something like total default was threatened. The provision for maintenance in every department was entirely inadequate, while, if adequate maintenance was received in existing conditions, the credit of the area, both public and private, would be destroyed. Neither public money for improvements nor mortgage money for private building would be obtainable, nor would present mortgages be renewable, unless under some form of Government compulsion.

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(1) [1939] 1 W. W. R. 275.
(2) [1916] 1 A. C. 566, 586.
(3) [1938] A. C. 415.
(4) [1937] O. R. 796, 823–4.

Their Lordships do not cite this report as evidence of the facts there found, but as indicating the materials which the Government of the Province had before them before promoting in the Legislature the statute now impugned, c. 74 of 1935, "an Act to amalgamate the City of East Windsor, "The Town of Walkerville, The City of Windsor and the "Town of Sandwich." The Act amalgamated the four municipalities into one municipality which was incorporated under the name of "The Corporation of The City of Windsor." As from a named date the existing municipal corporations were dissolved. A special body entitled the Windsor Finance Commission was constituted with interim powers of administering the affairs of the new city. By s. 6, sub-s. 1, it was to "have and exercise the same rights, authorities, powers and "duties as by the provisions of Part III. of the Department "of Municipal Affairs Act, 1935, are conferred upon the said "department," and the provisions of Part III. were to apply to the new city. The Finance Commission, by s. 7 (*c*), were to "undertake the preparation and submission of a plan "for funding and refunding the debts of the amalgamated "municipalities, upon the general basis that the debt of "each of the amalgamated municipalities shall be discharged "by the imposition of rates upon the rateable property in "that area of the new city which formerly comprised such "municipality." As far as the public utility commissions were concerned, a new commission was constituted by s. 12, sub-s. 1, entitled "The Windsor Utilities Commission." Certain powers were confided to it by s. 12, sub-s. 1, and s. 16. The Essex Borders Utilities Commission, the Waterworks Commission and Hydro-Electric Commission of the amalgamated municipalities, including the Walkerville–East Windsor Water Commission, were dissolved and ceased to exist. In pursuance of the Act the Finance Commission prepared a plan for submission to the Ontario Municipal Board. In 1936, however, an amending Act [The City of Windsor (Amalgamation) Amendment Act, c. 66 of 1936] was passed which did away with the Windsor Finance Commission and transferred its duties to the Department of Municipal Affairs for Ontario. Sects. 5, 6, 7 and 9 of the principal Act were repealed. The plan prepared by the Finance Commission for funding and refunding the debt was taken under consideration by the Municipal Board. After formulating what appears to have been an interim decision in December, 1936, the Board heard objections from creditors and others, and eventually, on June 15, 1937, made an order, which had received the consent of the new city and the majority of creditors, approving the final scheme. It is unnecessary to state the details of the scheme: generally it may be said that the former creditors receive debentures of the new city of equal nominal amount to those formerly held, but the interest is scaled down in various classes of debentures. Arrears of interest were dealt with by paying a composition in cash. It is not quite clear whether the scheme derives its statutory power from the provisions of the Amalgamation Acts of 1935 and 1936 or from the provisions of Part III. of the Department of Municipal Affairs Act, 1935, or from both sources. It was prepared under s. 7 of the Amalgamation Act of 1935, but that section was repealed by the Act of 1936. It becomes necessary, in any case, to discuss the provisions of Part III. of the Department of Municipal Affairs Act, 1935, for that Part is attacked by the plaintiffs as invalid, and it is expressly applied by the Amalgamation Acts to the new city and its affairs.

The Department of Municipal Affairs Act, 1935, is a general Act setting up a Department of Municipal Affairs whose duty it was to administer all acts in respect of municipal institutions and affairs. By an Act of the same date, an Act to amend the Ontario Municipal Board Act, 1932, 1935, c. 51, Part VI. of the Ontario Municipal Board Act, 1932, the heading of which is "Special Jurisdiction over "Defaulting Municipalities" was repealed, and the Department of Municipal Affairs Act of 1935 contained in Part III. corresponding provisions under the same heading. In substance, the provisions are that if the Ontario Municipal Board is satisfied after request and upon inquiry that a municipality has failed to meet its debentures or interest when due, or failed to meet any of its other debts or liabilities when due, owing to financial difficulties affecting the municipality, or has, or may, become financially involved or embarrassed so that default or unusual difficulty in meeting debts or obligations may ensue (as amended by the Department of Municipal Affairs Amendment Act, 1936, c. 15, s. 5), the Board may exercise the special jurisdiction and powers conferred by the Act. The powers extend to control over all the affairs of the corporation (s. 27, sub-s. 2) and include, in s. 33, powers in respect to the debenture debt and debentures of the municipality, and interest thereon, and also other indebtedness. These powers include power to order (*a*) the consolidation of the whole or any portion; (*b*) issue of debentures in payment and satisfaction of the whole or any portion of such other indebtedness, and compulsory acceptance of such debentures in payment and satisfaction thereof; (*f*) terms, conditions, places and times for exchange of new debentures for outstanding debentures; (*g*) postponement of or variation in the terms, times and places for payment of the whole or any portion of the debenture debt and outstanding debentures and other indebtedness and interest thereon and variation in the rates of such interest. It should be noticed that by s. 2 (*f*) of the Act, "municipality" includes any local board thereof; and by s. 2 (*b*) of the Ontario Municipal Board Act, 1932, "Local Board" includes any public utility commission. Counsel for the plaintiffs attacked the whole of the proceedings in connection with these municipalities on three grounds. He said that the relevant statutes and the authorities which they purported to give were ultra vires the Legislature of Ontario because they invaded the field of the Dominion as to: (1.) Bankruptcy and Insolvency (s. 91 (21.) of the British North America Act, 1867); (2.) Interest (s. 91 (19.)); and were not within the exclusive powers of the Province because (3.) they affected private rights outside the Province.

Before dealing with these contentions it is convenient to state that in the Courts in Canada objection was taken that the action which asks for declaratory relief was premature, inasmuch as the scheme of refunding the debts, which it is the object of the action to defeat, had not come into operation at the date of the writ. Before their Lordships this objection was wisely waived, as it was of importance to both parties to get a final decision on all the substantial points in issue.

It appears to their Lordships that the Provincial legislation cannot be attacked on the ground that it encroaches on the exclusive legislative power of the Dominion in relation to this class of subject. Their Lordships cannot agree with the opinion of Henderson J.A. that there is no evidence that these municipalities are insolvent. Insolvency is the inability to pay debts in the ordinary course as they become due; and there appears to be no doubt that this was the condition of these corporations. But it does not follow that because a municipality is insolvent the Provincial Legislature may not legislate to provide remedies for that condition of affairs. The Province has exclusive legislative power in relation to municipal institutions in the Province: s. 92 (8.) of the British North America Act, 1867. Sovereign within its constitutional powers, the Province is charged with the local government of its inhabitants by means of municipal institutions. If local government in any particular area becomes ineffective or non-existent because of the financial difficulties of one or more municipal institutions, or for any other reason, it is not only the right, but it would appear to be the duty, of the Provincial Legislature to provide the necessary remedy, so that the health of the inhabitants and the necessities of organized life in communities should be preserved. If corporation A or B or C is unable to function satisfactorily it would appear to be elementary that the Legislature must have power to provide that the functions of one or all should be transferred to some other body or corporation. For this purpose, as the corporation could be created by the Province, so it could be dissolved, and a new corporation created as a municipal institution to perform the duties performed by the old. The result of dissolution is that the debts of the dissolved corporation disappear. Amalgamation of municipalities for the purpose of more effective administration, whether for financial or other reasons, is a common incident of local government. It is necessarily accompanied by an adjustment of financial relations. Where the former bodies are dissolved it is inevitable that the old debts disappear, to be replaced by new obligations of the new body. And in creating the new corporation with the powers of assuming new obligations it is implicit in the powers of the Legislature (sovereign in this respect) that it should place restrictions and qualifications on the obligations to be assumed. Efficient local government could not be provided in similar circumstances unless the Province were armed with these very powers, and if for strictly Provincial purposes debts may be destroyed and new debts created, it is inevitable that debtors should be affected whether the original creditors reside within or without the Province. They took for their debtor a corporation which at the will of the Province could lawfully be dissolved, and of its destruction they took the risk. That for the purpose of keeping control over municipal institutions the Legislature provided that a department of the Provincial government should have the means of ascertaining whether a particular municipal body was solvent or insolvent does not make its legislative provision in that regard an encroachment on the general powers of the Dominion over bankruptcy and insolvency. It is of the essence of its control over local government administered by municipalities that it should have these powers of inquiry and decision. In other words, the pith and substance of both the Amalgamation Acts and the Municipal Board Act, 1932, and the Department of Municipal Affairs Act, 1935, are that the Acts are passed in relation to municipal institutions in the Province. They would also, so far as the public utility commissions are concerned, be justified as having been passed in relation to local works and undertakings under s. 92 (10.) of the British North America Act.

It was suggested in argument that the impugned provisions should be declared invalid because they sought to do indirectly what could not be done directly—namely, to facilitate repudiation by Provincial municipalities of obligations incurred outside the Province. It is unnecessary to repeat what has been said many times by the Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping within the statutory field. A colourable device will not avail. But in the present case nothing has emerged even to suggest that the Legislature of Ontario at the respective dates had any purpose in view other than to legislate in times of difficulty in relation to the class of subject which was its special care—namely, municipal institutions. For the reasons given the attack upon the Acts and scheme on the ground either that they infringe the Dominion's exclusive power relating to bankruptcy and insolvency, or that they deal with civil rights outside the Province, breaks down. The statutes are not directed to insolvency legislation ; they pick out insolvency as one reason for dealing in a particular way with unsuccessful institutions ; and though they affect rights outside the Province they only so affect them collaterally, as a necessary incident to their lawful powers of good government within the Province.

The question of interest does not present difficulties. The above reasoning sufficiently disposes of the objection. If the Provincial Legislature can dissolve a municipal corporation and create a new one to take its place, it can invest the new corporation with such powers of incurring obligations as it pleases, and incidentally may define the amount of interest which such obligations may bear. Such legislation, if directed bona fide to the effective creation and control of municipal institutions, is in no way an encroachment upon the general exclusive power of the Dominion Legislature over interest.

For these reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants: *Lee & Pembertons.*

Solicitors for the members of the Windsor Finance Commission; the City of Windsor and the Windsor Utilities Commission; and for the Attorney-General for Ontario: *Blake & Redden.*

J. C.*

1939

May 12.

BUTLER . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL FOR TRINIDAD AND TOBAGO.

Trinidad and Tobago—Court of Criminal Appeal—Constitution—Statutory regulation—Chief Justice and Puisne Judges—Acting Judges of Supreme Court not competent members of Court of Criminal Appeal—Judicature Ordinance, 1880, *c.* 35, *as amended, ss.* 3, 4, 5, 6 *and* 7*—Judicature* (*Amendment*) *Ordinance,* 1936, *ss.* 4, 5*—Criminal Appeal Ordinance, No.* 31 *of* 1931, *s.* 3.

Two acting judges having been appointed pursuant to s. 7 of the Judicature Ordinance, c. 35 of 1880, by the Governor of Trinidad and Tobago by letters patent under the Public Seal of the Colony to act as judges " of the Supreme Court and of the "Court of Criminal Appeal of the said Colony " for the express purpose of hearing and determining the appeal of the appellant from his conviction of sedition by the Supreme Court of the Colony, the appeal was heard by a Court consisting of the Chief Justice of the Colony and the two acting judges, and was dismissed :—

Held, that acting judges so appointed were not Puisne Judges of Trinidad and Tobago, and accordingly were not competent to sit as judges of the Court of Criminal Appeal of the Colony which, by s. 3, sub-s. 1, of the Criminal Appeal Ordinance, 1931, of Trinidad and Tobago, shall consist of the Chief Justice and " the Puisne Judges of Trinidad and Tobago." The Court which purported to adjudicate upon the appellant's appeal was not, therefore, properly constituted as the Court of Criminal Appeal in the Colony and had no jurisdiction to deal with the appeal, which, accordingly, had never been heard.

APPEAL (No. 96 of 1938), by special leave, from a judgment of a Court sitting as the Court of Criminal Appeal for Trinidad and Tobago (January 28, 1938), which had dismissed an appeal by the appellant, Tubal Uriah Butler, against his conviction on a charge of sedition and sentence of two years' imprisonment with hard labour, passed upon him by the Supreme Court of Trinidad and Tobago (December 16, 1937).

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* *Present*: LORD RUSSELL OF KILLOWEN, LORD ROMER, and SIR GEORGE RANKIN.

J. C.
1939
Butler
v.
The King.

The only question in this appeal was whether the Court which heard the appellant's appeal in the Colony was duly constituted according to the provisions of the Criminal Appeal Ordinance, 1931, of Trinidad and Tobago, having regard to the fact that the Court included two acting judges. The Ordinance of 1931, by s. 3, sub-s. 1, provides that: "There "shall be a Court of Criminal Appeal in the Colony, and the "Chief Justice of Trinidad and Tobago and the Puisne Judges "of Trinidad and Tobago shall be Judges of that Court." The Court which heard and dismissed the appeal was composed of the Chief Justice (Gerahty C.J.), acting Justice Hobson K.C., and acting Justice Boland, and the question was whether the two acting judges were members of, or entitled to sit in, the Court of Criminal Appeal. They were appointed by the Governor of the Colony by Letters Patent under the Public Seal of the Colony pursuant to the power conferred by s. 7 of the Judicature Ordinance, 1880, c. 35, as subsequently amended, to act as judges " of the Supreme Court and of the "Court of Criminal Appeal of the said Colony " for the purpose of hearing and determining the appeal of Butler. By s. 7, sub-s. 3, of the Judicature Ordinance, c. 35, a person appointed to act as a judge of the Supreme Court " shall, so far as may "be necessary for the purpose of his appointment, have all the "powers of a Judge of the Court . . . ."

The relevant statutory provisions appear fully from the judgment of the Judicial Committee.

1939. April 24. *Hon. Sir Stafford Cripps K.C.* and *G. Granville Slack* for the appellant. This appeal is limited to the question whether the Court of Criminal Appeal was properly constituted, and the point is whether under the material Ordinances of Trinidad and Tobago there is power in the Governor to appoint acting judges to the Court of Criminal Appeal. There is no doubt that he had power to appoint acting judges to the Supreme Court. [Reference was made to the Judicature Ordinance, c. 35 of 1880, as amended by a number of subsequent Ordinances; the Judicature (Amendment) Ordinance, 1936; the Criminal Appeal

Ordinance, 1931; and the Interpretation Ordinance, 1933.] There is no provision in the Criminal Appeal Ordinance, as there is in the Judicature Ordinance, s. 7, for the appointment of any acting judges to take the place of the Puisne Judges in the event of absence or illness, or other cause. The Legislature have thought that so far as the Court of Criminal Appeal was concerned it was not desirable to give power to appoint acting judges to take the place of Puisne Judges. It is conceded that the clearest words were not used, but the appointee was given power to act as a judge " of the Court " (s. 7, sub-s. 3, of the Judicature Ordinance, 1880), that is, of the Supreme Court, and nothing further. When they set up the Court of Criminal Appeal, the Legislature did not make any provision at all for an acting judge to serve on that Court; they limited it to the actual Chief Justice and the Puisne Judges of Trinidad and Tobago. Acting judges are not Puisne Judges. Further, it is submitted that the Interpretation Ordinance, 1933, has no bearing on the question of appointing acting judges, because that has been specially dealt with by an Ordinance of its own—the Judicature Ordinance. For the purposes of s. 17 of the Interpretation Ordinance a judge is not a public officer, because he has already been separately dealt with by the Legislature, and must be taken to be excluded from this section. This is a case where the Governor has gone outside his power, and where the Court of Criminal Appeal was not properly constituted, and the appellant's appeal from his conviction has not been heard.

Sir Donald Somervell A.-G. and *Kenelm Preedy* for the Crown. It is submitted that the Crown can succeed without the necessity of relying on s. 20 of the Interpretation Ordinance. The words of s. 7, sub-s. 3, of the Judicature Ordinance are " all the powers " of a judge of the Court. The Criminal Appeal Ordinance provides that that Court shall consist of the "Chief Justice of Trinidad and Tobago and the "Puisne Judges of Trinidad and Tobago"—that is, a judge of the Supreme Court is a judge of the Court of Criminal Appeal. It is within his powers to be so. The Governor has power to appoint a person to act as a judge of the Supreme Court, and it is submitted that it was not necessary to put in the Criminal Appeal Ordinance a special provision for acting judges because that Court is to be staffed by the judges of the Supreme Court. *Reg.* v. *Marais, In re. Ex parte Marais* (1) decided that an acting judge of the Supreme Court is a judge of the Supreme Court. "Puisne," which distinguishes the ordinary judges from the Chief Justice, is simply nomenclature, and does not go to jurisdiction.

Taking the matter in stages: The Puisne Judges, so described and called, are the persons who have the powers of the Supreme Court. There is no dispute that the Governor has power to appoint persons to act with their jurisdiction and their powers. Sect. 7 of the Judicature Ordinance, which gives that power to the Governor, does not refer to the word "puisne" at all. The power is a perfectly general one. A person so appointed would have all the powers of a Puisne Judge, and unless he be regarded as a Puisne Judge the matter does not make sense. What are the powers, having regard to the Criminal Appeal Ordinance? The plain meaning is that judges of the Supreme Court are judges of the Court of Criminal Appeal. The section does not say "all the powers "'as' a judge of the Court," but "all the powers 'of' a judge "of the Court," and one of the powers of a judge of the Supreme Court is to sit and hear criminal appeals as a member of the Court of Criminal Appeal. The acting judges of the Supreme Court could act as judges of the Court of Criminal Appeal.

Assuming that by a casus omissus deputies for the Court of Criminal Appeal are wholly unprovided for by any special provision in any Ordinance, either by way of addition or substitution, then there is no express provision dealing with the case in which the Governor desires, or thinks it expedient, to appoint some one instead of a Puisne Judge to hear a case in the Court of Criminal Appeal, and in the absence of special legislative provisions it is submitted that such a power is to be found under either s. 17 or s. 20, sub-s. 2, of the Interpretation Ordinance. On this basis Puisne Judges qua judges of the Court of Criminal Appeal are officers who have not been dealt

(1) [1902] A. C. 51.

with by any other statute quoad the appointment of persons to act for them in the event of their inability from any cause to carry out their duties. Sect. 17 is intended to enable such a thing to be done in cases where the power could not be implied without a statute and where statutory authority is necessary.

Hon. Sir Stafford Cripps K.C. replied. With regard to the Interpretation Ordinance, so far as s. 17 is concerned, there are two answers: whether the power existed or not, the Governor has not acted under it; he has purported to act under s. 7 of the Judicature Ordinance: secondly, the words of s. 17 are wholly inapplicable to the present case; they deal with where a person is not able to perform the duties of his office, not in respect of any single matter—as the hearing of a particular appeal. As to the Crown's main point, the fundamental fallacy in the argument results from the fact that the Puisne Judges of Trinidad and Tobago are three specified persons, and only three such judges may exist at any one time in accordance with the law. If the acting judges appointed were Puisne Judges, there was a breach of the law. When, therefore, one is dealing in the Court of Criminal Appeal with Puisne Judges of Trinidad and Tobago they are three known persons. If the Legislature had desired to say "anyone acting as a judge of the "Supreme Court may act as a judge of the Court of Criminal "Appeal," it could perfectly well have said so, and the result of the legislation would have been different from what it is now. The appointment of a judge ad hoc under s. 7 of the Judicature Ordinance is to give him the powers not of a Puisne Judge, but of a judge of the Supreme Court, and s. 7, sub-s. 3, says that he may have all the powers of a judge of the Court. It is not a power of a judge of the Supreme Court to sit as a judge of the Court of Criminal Appeal—it may be a duty, but it is not a power. Sect. 7 clearly means that the person appointed to act as a judge shall be able to conduct the business of the Supreme Court as if he were a judge. He can do everything a Supreme Court judge can do in the Supreme Court; but the Court of Criminal Appeal is a completely new and different Court; it is to be staffed by four known persons, and, if it had been desired to arrange that others could be substituted for them, then some clause to that effect would have been found in the statute. Lastly, a Puisne Judge can only be appointed by the Imperial Government through the Colonial Office; an acting judge can be appointed locally.

May 12. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN. The appellant was indicted on a charge of sedition, before Robinson J. and a jury, in the Supreme Court of Trinidad and Tobago. He was found guilty and on December 16, 1937, was sentenced to two years imprisonment with hard labour. He appealed from the conviction to the Court of Criminal Appeal of that Colony. The appeal was heard and dismissed on January 28, 1938.

The appellant then petitioned His Majesty in Council for special leave to appeal in formâ pauperis alleging, amongst other grounds, that the Court which had heard and dismissed his appeal was not a duly constituted Court; and by Order in Council, dated July 28, 1938, leave was granted to him to appeal against the judgment of January 28, 1938, "the appeal "to be limited to the sole question whether the said Court "was duly constituted according to the provisions of the "Criminal Appeal Ordinance, 1931 (No. 31 of 1931), of "Trinidad and Tobago, having regard to the fact that the Court "included two acting judges."

Their Lordships are accordingly in no way concerned with the merits of the appellant's appeal from his conviction. They have only to consider whether the appeal was heard by a tribunal capable of adjudicating upon it.

The Court which heard and dismissed the appeal was composed of the Chief Justice of the Colony, acting Justice Hobson K.C. and acting Justice Boland. The question for determination is whether the two last-named gentlemen were members of, or entitled to sit in, the Court of Criminal Appeal. The solution of this question depends upon the true construction of certain Ordinances.

The Judicature Ordinance, c. 35, is dated March 20, 1880, and (as amended by a number of subsequent Ordinances) provides as follows:—

J. C.
1939
BUTLER
v.
THE KING.

"3. There shall be one Supreme Court in the Colony, which "shall be a Superior Court of Record, and such Court shall be "called the Supreme Court of Trinidad and Tobago.

"4.—(1.) The Supreme Court shall consist of not more than "three and not less than two Judges, of whom one shall be "called the Chief Justice of Trinidad and Tobago and shall be "the President of the Court, and the other or others shall be "called the Puisne Judge or Puisne Judges of Trinidad and "Tobago, and shall, if more than one, be called the First and "Second Puisne Judges according to the terms of their "respective appointments." (*Substituted by* 23 *of* 1914, *s.* 3.)

"(2.) The Court shall be deemed to be duly constituted "notwithstanding any vacancy in the office of any Judge.

"5. Every Judge of the Court shall be appointed by Letters "Patent under the Public Seal of the Colony by the Governor, "in accordance with such instructions as he may receive "through one of His Majesty's Principal Secretaries of State, "and shall hold his office during His Majesty's pleasure, "subject to any conditions contained in any regulations made "by or under the authority of His Majesty for His Majesty's "Colonial Service, and shall receive such salary as the Governor, "with the sanction of the Legislative Council, may appoint. "The acceptance by any Judge of the Court of any other "office or place of profit or emolument not authorized by "law shall be and be deemed de facto an avoidance of his "office of Judge, and his salary as Judge shall cease accordingly "from the time of his acceptance of such other office or place.

"6. Any act required or authorized to be done by, before "or in the name of the Chief Justice may be done by, before "or in the name of a Puisne Judge of the Court in case of the "absence on leave or otherwise, indisposition, or inability to "attend of the Chief Justice.

"7.—(1.) Whenever the office of any Judge of the Court is "vacant, or whenever any Judge is absent from the Colony, "or is, by reason of illness, interest in any cause or matter, "or for any other reason, incapable of acting, or whenever "in the opinion of the Governor the due administration of "justice so requires, the Governor may, in the name of His

"Majesty, by Letters Patent under the Public Seal of the "Colony, appoint some person, being a barrister-at-law of "five years standing at least to act as Judge of the Court.

"(2.) Every such appointment shall be for such time, or "for the trial or hearing of such causes or matters, or otherwise, "as may be specified in the instrument of appointment.

"(3.) Every person so appointed and acting under such "appointment shall, so far as may be necessary for the "purposes of his appointment, have all the powers of a Judge "of the Court, and all acts done within the scope of his appoint-"ment by any person so appointed and acting as aforesaid "shall be as valid as if done by a Judge, whether in Court or "Chambers or otherwise." (*Substituted by* 25 *of* 1925, *s.* 2.)

By the Judicature (Amendment) Ordinance, 1936 (No. 24 of 1936), the following sections were substituted for the 4th and 5th sections above set out, namely:—

"4.—(1.) The Supreme Court shall consist of four Judges, "one of whom shall be designated the Chief Justice of Trinidad "and Tobago and the others the Puisne Judges of Trinidad and "Tobago.

"The Chief Justice shall be the President of the said Court. "The Puisne Judges shall be called the First, Second and "Third Puisne Judges according to the terms of their respective "appointments.

"(2.) The Court shall be deemed to be duly constituted "notwithstanding any vacancy in the office of any Judge.

"5. Every Judge of the Court shall be appointed "by Letters Patent under the Public Seal of the Colony by the "Governor, in accordance with such instructions as he may "receive through one of His Majesty's Principal Secretaries of "State, and shall hold his office during His Majesty's pleasure, "subject to any conditions contained in any regulations made "by or under the authority of His Majesty for His Majesty's "Colonial Service, and shall receive such salary as the "Governor, with the sanction of the Legislative Council, may "appoint. No Judge shall accept or perform any other office "or place of profit or emolument not authorized by law "without the consent of the Governor: Provided that this "restriction shall not apply to a Judge temporarily appointed "to act as such under section 7 of this Ordinance."

The Supreme Court of the Colony accordingly now consists of four judges, namely, the Chief Justice and the first, second and third Puisne Judges.

In 1931 there was enacted an Ordinance to establish in the Colony a Court of Criminal Appeal, namely, the Criminal Appeal Ordinance, 1931. That Ordinance contained the following provisions :—

"3.—(1.) There shall be a Court of Criminal Appeal in the "Colony, and the Chief Justice of Trinidad and Tobago and the "Puisne Judges of Trinidad and Tobago shall be Judges of that "Court.

"(2.) For the purpose of hearing and determining appeals "under this Ordinance, and for the purpose of any other pro-"ceedings under this Ordinance, the Court of Criminal Appeal "shall be summoned in accordance with directions given by the "Chief Justice, and the Court shall be duly constituted if it "consists of three Judges.

"The Court shall sit in Port-of-Spain except in cases where "the Chief Justice gives special directions that it shall sit at "some other place.

"(3.) The Chief Justice, if present, and in his absence the "senior member of the Court, shall be president of the Court.

"(4.) A judge of the Court of Criminal Appeal shall not sit "as a judge on the hearing of any appeal, or on the hearing of "any application for leave to appeal, against a verdict given or "sentence passed at a trial at which he presided, or on the "consideration of any point reserved by him under the pro-"visions of the Criminal Procedure Ordinance, Cap. 5.

"(5.) The determination of any question before the Court of "Criminal Appeal shall be according to the opinion of the "majority of the members of the Court hearing the case.

"(6.) Unless the Court direct to the contrary in cases where, "in the opinion of the Court, the question is a question of law "on which it would be convenient that separate judgments "should be pronounced by the members of the Court, the "judgment of the Court shall be pronounced by the president "of the Court or such other member of the Court hearing the "case as the president of the Court directs, and no judgment "with respect to the determination of any question shall be "separately pronounced by any other member of the Court.

"(7.) The Court of Criminal Appeal shall be a superior court "of record, and shall, for the purposes of and subject to the "provisions of this Ordinance, have full power to determine, "in accordance with this Ordinance, any questions necessary "to be determined for the purpose of doing justice in the case "before the Court.

"(8.) Any direction which may be given by the Chief Justice "under this section may in the event of any vacancy in that "office or in the event of the incapacity of the Chief Justice to "act from any reason, be given by the senior Judge of the "Court of Criminal Appeal."

It is to be observed that the Court so established is not established as a branch of the existing Supreme Court, but as a separate Court of Record, the judges of which are stated to be "the Chief Justice of Trinidad and Tobago and the Puisne "Judges of Trinidad and Tobago." It is further to be observed that the Criminal Appeal Ordinance contains no power to appoint a person to act as a judge of the Court of Criminal Appeal.

The critical point now becomes apparent. Is a person who has been appointed under s. 7 of the Judicature Ordinance "to "act as Judge of the Supreme Court" a member of the Court of Criminal Appeal or capable of acting as such ?

The letters patent appointing Mr. Hobson to be acting Justice ran thus :—

"WHEREAS by section 7 of the Judicature Ordinance, "Chapter 35, it is among other things provided that whenever "in the opinion of the Governor the due administration of "justice so requires the Governor may, in the name of His "Majesty, by Letters Patent under the Public Seal of the "Colony, appoint some person, being a Barrister-at-Law of "five years standing at least to act as Judge of the Supreme "Court ;

"AND WHEREAS it is expedient to appoint some person to "act as a Judge of the Supreme Court for the purpose of hearing "and determining the appeal of Tubal Uriah Buz Butler to the "Court of Criminal Appeal in the case of The King vs. Tubal "Uriah Buz Butler for Sedition;

"KNOW ye therefore by these presents that WE being well "satisfied of the loyalty, integrity and ability of JOHN "DAVIDSON HOBSON, ESQUIRE, B.A., K.C., do hereby "appoint and said John Davidson Hobson to act as Judge of "the Supreme Court and of the Court of Criminal Appeal of "the said Colony as from the 24th day of January 1938 for the "purpose of hearing and determining the said appeal of the "said Tubal Uriah Buz Butler, and for that purpose to have, "hold, exercise and enjoy the said office and place, together "with all rights, privileges and advantages thereunto belonging "or appertaining."

The letters patent appointing Mr. Boland were in identical language.

It seems plain to their Lordships that, if the acting judges were members of the Court of Criminal Appeal, or were capable of sitting therein, that result can have flowed only from their having been appointed to act as judges of the Supreme Court, for no power existed to appoint them to act simply as judges of the Court of Criminal Appeal, or to appoint them for the hearing of a specified matter in that Court.

It is said on behalf of the respondent that the result does flow from their appointment to act as judges of the Supreme Court, because under s. 7, sub-s. 3, of the Judicature Ordinance every person so appointed is given all the powers of a judge of the Supreme Court, and that one of the powers thus given is the power of a judge of the Supreme Court to sit and adjudicate in the Court of Criminal Appeal.

Their Lordships are unable to accept this contention. The powers conferred by s. 7, sub-s. 3, are the powers exerciseable by a judge of the Supreme Court when he is acting in that capacity. Those are the powers which are to be exerciseable by the appointee when he is acting in the same capacity. They are only conferred upon him "so far as may be necessary for "the purpose of his appointment," i.e., his appointment to act

J. C.
1939
BUTLER
v.
THE KING.

as a judge of the Supreme Court; and it is the acts done by a person "acting as aforesaid" which are to be as valid as if done by a judge. Nor is it true to say that one of the powers of a judge of the Supreme Court is the power to sit and adjudicate in the Court of Criminal Appeal. That power is derived only from the fact that the constituent members of that Court are, by enactment, the individuals who are the Chief Justice and the Puisne Judges of Trinidad and Tobago. A person appointed under s. 7, sub-s. 3, of the Judicature Ordinance is not a Puisne Judge of Trinidad and Tobago, nor is he under that provision invested with any powers beyond such as are necessary to enable him to act effectively as a judge of the Supreme Court.

Two further contentions were advanced on behalf of the respondent, based upon ss. 17 and 20 of the Interpretation Ordinance, 1933 (No. 19 of 1933). Those sections provide as follows:—

Sect. 17. "Where by or under any law, any powers are "conferred or any duties are imposed upon a public officer, the "Governor may direct that if during any period owing to "absence or inability to act from illness or any other cause "such public officer shall be unable to exercise the powers or "perform the duties of his office in any place under his jurisdiction or control, such powers shall be had and may be exercised "and such duties shall be performed in such place by the "person named by or by the public officer holding the office "designated by the Governor; and thereupon such person or "public officer, during any period as aforesaid, shall have and "may exercise the powers and shall perform the duties aforesaid, subject to such conditions, exceptions, and qualifications "as the Governor may direct."

Sect. 20. "(1.) Where any law confers a power or imposes a "duty then, unless the contrary intention appears, the power "may be exercised and the duty shall be performed from time "to time as occasion requires.

"(2.) Where any law confers a power or imposes a duty on the "holder of an office, as such, then, unless the contrary intention "appears, the power may be exercised and the duty shall be

J. C.
1939
BUTLER
v.
THE KING.

"performed by the holder of the office for the time being or by a "person duly appointed to act for him."

It was said that the case was covered by one or other of these sections; but quite plainly neither section can apply. Each section deals with the case of one individual being appointed to take the place of another individual, and to act as a substitute for him. In the present case neither Mr. Hobson nor Mr. Boland was appointed to take any one's place, or to act as a substitute for any individual.

Nor can the respondent derive any help from the decision of their Lordships' Board which was cited, namely, *Reg.* v. *Marais, In re. Ex parte Marais* (1), which at most might be an authority to establish that a person appointed to act as a judge of the Supreme Court is a judge of the Supreme Court. But it falls far short of establishing the proposition that a person appointed so to act is a member of, or entitled to sit in, a Court, the judges of which, it is enacted, shall be the Chief Justice and the Puisne Judges of the Colony. An acting judge is not a Puisne Judge of the Colony, for the number of Puisne Judges is fixed and cannot be exceeded. Moreover, they are appointed in accordance with instructions received through a Secretary of State, which is not the case with acting judges.

For the reasons indicated, their Lordships are of opinion that the Court which purported to adjudicate upon the appellant's appeal from his conviction was not properly constituted as the Court of Criminal Appeal in the Colony. It had no jurisdiction to deal with the matter. The appeal from the conviction has accordingly never been heard. This appeal should therefore be allowed, and the judgment of the Chief Justice and the two acting judges of January 28, 1938, should be declared to be void and of no effect. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant: *Hy. S. L. Polak & Co.*
Solicitors for the Crown: *Burchells.*

(1) [1902] A. C. 51.

[PRIVY COUNCIL.]

J. C.*
1939
May 15.

ADABLA (SUBSTITUTED FOR AFIANU, DECEASED) ON BEHALF OF HIMSELF AND ALL OTHER MEMBERS OF THE ANYIGBE TRIBE . . . . APPELLANT;

AND

GBEVLO AGAMA AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Gold Coast—Statutory appeal provisions—Construction—Competency of appeal—Exercise of discretion—Native Administration Ordinance (Gold Coast), No. 18 *of* 1927, *ss.* 75, 76 *and* 77—*Native Administration Amendment Ordinance (Gold Coast), No.* 18 *of* 1935, *s.* 13.

Sub-s. 1 of s. 77 of the Native Administration Ordinance, 1927, which provides that a party desiring to appeal from a Paramount Chief's Tribunal shall first obtain the leave of such Tribunal, and sub-s. 2 of s. 77, which prescribes conditions to be fulfilled in connection with costs before leave to appeal will be granted, are both qualified by s. 13 of the Native Administration Amendment Ordinance, 1935, which provides that: "Sub-section 2 "of section 77 of the Native Administration Ordinance shall be "amended by adding at the end thereof the following proviso:— "Provided that notwithstanding anything in this section contained "the West African Court of Appeal may in its discretion, for "the purpose of doing substantial justice between the parties, "hear and determine any appeal brought before it on such terms "and conditions as it may deem just."

Whether or not, therefore, the provisions of sub-s. 1 of s. 77 of the Native Administration Ordinance, 1927, have been complied with by obtaining from the Paramount Chief's Tribunal leave to appeal to the Provincial Commissioner's Court, the West African Court of Appeal, in the exercise of its discretion under the proviso, has jurisdiction to hear and determine an appeal on its merits from a judgment of the Provincial Commissioner's Court on an appeal from the Native Tribunal.

A refusal by the West African Court of Appeal to entertain an appeal from the Provincial Commissioner's Court on the ground that, since the granting of leave to appeal to the Provincial Commissioner's Court under sub-s. 1 of s. 77 is discretionary in the Paramount Chief's Tribunal, and might be refused there, an appeal should not be entertained from a decision of the Provincial

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**Present:* LORD RUSSELL OF KILLOWEN, LORD ROMER, and SIR GEORGE RANKIN.

Commissioner where that step of applying to the Native Tribunal has been omitted, is a wrongful exercise of the West African Court of Appeal's discretion under the proviso in s. 13 of the Amendment Ordinance.

Judgment of the West African Court of Appeal reversed in part.

APPEAL (No. 10 of 1938) from a judgment of the West African Court of Appeal (Gold Coast Session) (December 9, 1936), which had reversed a judgment of the Provincial Commissioner's Court (Eastern Province) of the Gold Coast (August 16, 1934), which in turn had reversed a decision of the High Native Tribunal of Ada (January 18, 1929).

In the action out of which this appeal arose the plaintiff, originally one Afianu, since deceased, and now represented by the appellant Adabla, sued as the head of the Anyigbe Tribe, and claimed on behalf of himself and the members of his tribe a declaration of title of ownership of certain land with creeks, known as Tsidjen and Akah, situated in the Aggravey Division of the Ada District, and an injunction restraining the defendants (respondents), Gbevlo Agama and others, as representing the Fieve Tribe, from trespassing on the said land and creeks. The High Native Tribunal delivered judgment in favour of the respondents. An appeal by the present appellant to the Provincial Commissioner's Court was allowed, and an injunction granted as claimed, subject to certain reservations.

The respondents then appealed against the decision of the Provincial Commissioner to the West African Court of Appeal, on the ground (inter alia) that the appeal to the Provincial Commissioner's Court was not properly before it, and that it had no jurisdiction to hear the appeal at all, and that therefore its judgment was without jurisdiction. That objection was grounded on the allegation that an application for leave to appeal from the decision of the High Native Tribunal had been made improperly to, and had been granted by, the Provincial Commissioner's Court, and had not been granted by the High Native Tribunal as required by sub-s. 1 of s. 77 of the Native Administration Ordinance, 1927.

J. C.
1939
ADABLA
v.
GBEVLO
AGAMA.

The relevant statutory provisions appear from the judgment of the Judicial Committee.

The West African Court of Appeal (Kingdon C.J. (Nigeria), Petrides C.J. (Gold Coast), and Webber C.J. (Sierra Leone)) allowed the respondents' appeal and restored the judgment of the High Native Tribunal. The Court was divided as to the proper construction of the Amendment Ordinance of 1935, the majority of the Court holding that the Court had no power to act under the proviso as applying to sub-s. 1 of s. 77 of the Ordinance of 1927, but they were unanimous in holding that the case under appeal was not one for exercising their discretion in favour of the present appellant to hear the appeal on its merits. The result of that decision was stated to be that the judgment of the Provincial Commissioner's Court amounted to a nullity.

The questions in this appeal were whether in the circumstances the judgment of the Provincial Commissioner was pronounced without jurisdiction, and, if so, whether the West African Court of Appeal could and should, in its discretion, have heard and determined the appeal therefrom.

1939. May 2. *W. H. Stoker* for the appellant. There has been no decision on the merits of this case, and the only questions now raised relate to jurisdiction and the exercise of discretion. The West African Court of Appeal appear not to have noticed that the appeal from the Paramount Chief's Court to the Provincial Commissioner's Court is as of right: certain formalities have to be complied with, however, and formal leave to appeal must be obtained. There appears to be some doubt whether all those formalities were properly carried out before the matter came to the Provincial Commissioner's Court—it was on that ground that the West African Court of Appeal found that the judgment of the Provincial Commissioner's Court was a nullity. [Reference was made to the Native Administration Ordinance, No. 18 of 1927, ss. 74, 75, 76 and 77.] It is submitted that the words, an appeal "shall lie" in s. 75 of that Ordinance, give

J. C.
1939
ADABLA
v.
GBEVLO
AGAMA.

an absolute right of appeal. The application to the Paramount Chief's Tribunal for leave to appeal is merely a formal application, but would appear to be a procedure which must be adopted. The question is, if the application is not made, and the matter nevertheless somehow gets to the Provincial Commissioner's Court, are the proceedings before that Court absolutely null. It would appear that leave was obtained from the Provincial Commissioner's Court, and the appellant complied with all the conditions. The West African Court of Appeal suggested that in going to the Provincial Commissioner's Court for leave to appeal, instead of obtaining it from the Paramount Chief's Tribunal, the appellant went to the wrong Court. There is nothing to show, however, that no application was made to the High Native Tribunal.

It is submitted that the proviso in s. 13 of the Native Administration Amendment Ordinance of 1935 applies to the whole of s. 77 of the Ordinance of 1927, and it was so held by the majority in the West African Court of Appeal. The discretion given by the proviso should have been exercised in the appellant's favour, and the appeal heard on its merits. The presumption should be either that leave had been applied for to the High Native Tribunal, and refused, or that leave had been granted by the Native Tribunal and the appellant was sent to the Provincial Commissioner's Court to have conditions fixed. It is preferred that the argument should be grounded on the presumption that there had been an application to the High Native Tribunal. The presumption is in favour of things having been done regularly, and that presumption has not been displaced. It is submitted that no irregularity was proved, but, assuming that it was, the matter should be sent back to the West African Court of Appeal for the exercise of their discretion. The question is whether or not the Amendment Ordinance of 1935 applies to both sub-sections of s. 77 of the Ordinance of 1927.

[LORD RUSSELL OF KILLOWEN: I do not see, in the face of the decision in *Ohin Moore* v. *A. Taye* (1), why the

(1) 1 W. A. C. A. 242.

J. C.
1939
ADABLA
v.
GBEVLO
AGAMA.

amendment of 1935 should not go to the whole of s. 77. The words of s. 13 are "notwithstanding anything in this section."]

[On the question of the exercise of discretion reference was made to *Gardner* v. *Jay* (1), and *In re Martin. Hunt* v. *Chambers.* (2)]

The respondents did not appear and were not represented.

May 15. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN. This appeal is brought from a judgment of the West African Court of Appeal (Gold Coast Session) allowing the appeal of the respondents from a judgment of the Provincial Commissioner's Court (Eastern Province) of the Gold Coast in favour of the plaintiff in the proceedings. That judgment had reversed a judgment of the High Native Tribunal of Ada given in favour of the respondents. The appellant has been substituted in the course of the proceedings for the original plaintiff, who had died.

The litigation is between representatives of two tribes—namely, the Anyigbe tribe and the Fieve tribe, and relates to the ownership of land. The representatives of the Anyigbe tribe are the appellants before the Board ; but their Lordships are not, on this appeal, in any way concerned with the merits of the dispute between the litigants. The appeal relates to the questions whether in the circumstances of the case the judgment of the Provincial Commissioner's Court was pronounced without jurisdiction, and, if so, whether the Court of Appeal (in its discretion) could and should have heard and determined the appeal therefrom.

The answer to these questions depends primarily upon the true construction and effect of the Native Administration Ordinance (No. 18 of 1927) and the Native Administration Amendment Ordinance, 1935 (No. 18 of 1935) (Gold Coast Colony).

The relevant sections of the first-named Ordinance are ss. 75, 76 and 77, which provide :—

"75. In any suit or matter relating to the ownership,

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(1) (1885) 29 Ch. D. 50, 58.

(2) (1882) 20 Ch. D. 365, 373.

"possession, or occupation of any lands an appeal shall lie "from the decision of the Paramount Chief's Tribunal to the "Provincial Commissioner's Court."

"76. No appeal shall lie under section 73, section 74, or "section 75 unless the party appealing shall give notice of "appeal within the proper periods hereinafter in this section "prescribed, reckoning from the date of the decision appealed "against, namely :—

"(*a*) From a Divisional Chief's Tribunal to a Paramount "Chief's Tribunal, within two months ;

"(*b*) From a Paramount Chief's Tribunal to the District "Commissioner's Court, within four months ;

"(*c*) From a Paramount Chief's Tribunal to the Provincial Commissioner's Court, within six months."

"77. (1.) A party desiring to appeal from a Paramount "Chief's Tribunal shall first obtain the leave of such Tribunal "so to do ; provided that, if the said Tribunal shall have "refused such leave, the Provincial Commissioner's Court "or the District Commissioner's Court may nevertheless "grant leave to appeal.

"(2.) Leave to appeal from a Paramount Chief's Tribunal "shall not be granted unless and until the appellant shall either "have paid the costs in such Tribunal or shall have deposited "therein or in the Court to which the appeal is being taken a "sum of money sufficient to satisfy such costs ; and such "Court shall not grant a stay of execution with respect to the "said costs."

The Amendment Ordinance contains a section, s. 13, which runs thus : " 13. Sub-section 2 of section 77 of the Native "Administration Ordinance shall be amended by adding at "the end thereof the following proviso : Provided that notwithstanding anything in this section contained the West "African Court of Appeal may in its discretion, for the purpose "of doing substantial justice between the parties, hear and "determine any appeal brought before it on such terms and "conditions as it may deem just."

The facts relevant to the present appeal may now be shortly stated. After the judgment of the High Native Tribunal (which is a Paramount Chief's Tribunal), and within the six months required by s. 76, sub-s. 3, an order was made (dated April 16, 1929) by the Provincial Commissioner's Court granting to the plaintiff leave to appeal from the decision of the Paramount Chief's Tribunal on certain conditions. The conditions were duly complied with, and on May 15, 1929, the conditional leave was made final. There is at present no material available to show that any application for leave to appeal had been made to the Paramount Chief's Tribunal, or that, if made, it had been refused. On the one hand, their Lordships were told by counsel for the appellant that the affidavit which was filed in support of the application leading up to the order of April 16, 1929, and which was not printed in the record before the Board, had been read by him, and that it contained no reference to any application to the Paramount Chief's Tribunal for leave to appeal. On the other hand, their Lordships find it difficult to believe that the Commissioner would act under s. 77, sub-s. 1, without being satisfied that the conditions precedent to his being competent to make any order thereunder which are therein specified had been complied with.

However that may be, the plaintiff's appeal was subsequently heard and adjudicated upon in the Provincial Commissioner's Court, with results favourable to the plaintiff. The defendants thereupon appealed to the West African Court of Appeal. The appeal came on for hearing before Sir Donald Kingdon C.J. (Nigeria), Sir Philip Bertie Petrides C.J. (Gold Coast), and Arthur Webber C.J. (Sierra Leone), on April 28, 1936. Counsel for the defendants contended (amongst other grounds of appeal) that the Provincial Commissioner had no jurisdiction to grant leave to appeal, and that consequently his judgment on the hearing of the appeal was without jurisdiction. Counsel for the plaintiffs asked that inquiry be made. The case was accordingly adjourned for a report from the Provincial Commissioner upon two points—namely, (1.) whether there were any proceedings in the Native Tribunal by way of application filed for appeal between the date of the original judgment and the date of the order of the Provincial

Commissioner's Court giving conditional leave to appeal; and (2.) the delay which had apparently occurred in the case. The report of the Commissioner gave an explanation of the delay, but gave no information on the first point.

The adjourned hearing of the defendants' appeal took place on November 16, 1936, when the matter was again adjourned in order to get a reply on the first point from the Commissioner. At the further hearing, on December 3, 1936, a telegram from the Commissioner was read, which stated—" No record can be traced in Ada Manche's Tribunal "[i.e., the Native Tribunal in question] of any proceedings by "way of application for leave to appeal between 18th January, "1929, and 16th April, 1929." Counsel for the plaintiff desired to read a letter written by direction of the Paramount Chief (who, he said, was illiterate) indicating that leave must have been granted, but the Court refused to look at it.

Judgment was reserved, and was delivered on December 9, 1936. The Chief Justice of the Supreme Court of Sierra Leone was of opinion that the proviso introduced by the Ordinance No. 18 of 1935 qualified only the second sub-section of s. 77 of the Ordinance No. 18 of 1927, and that, since no record could be traced in the Paramount Chief's Tribunal of any application for leave to appeal, the proceedings before the Provincial Commissioner's Court amounted to a nullity. But he was also of opinion that, assuming that the proviso applied also to the first sub-section of s. 77, the case was not one for exercising the discretion conferred by the proviso, because the granting of leave by the Paramount Chief's Tribunal was discretionary, and might or might not be granted, and in his (the Chief Justice's) view, " an appeal should not "be entertained when this essential step has been omitted." The Chief Justice of the Supreme Court of Nigeria concurred in that judgment. The Chief Justice of the Gold Coast concurred with that part of the judgment which dealt with the exercise of discretion under the proviso, but dissented from the construction of s. 13 of the Ordinance No. 18 of 1935. He was of opinion that the proviso qualified both sub-sections of s. 77, feeling unable to depart from the ordinary meaning of the word "section" in the proviso. In the result, an order was made allowing the defendants' appeal, setting aside the judgment of the Provincial Commissioner's Court and restoring the judgment of the High Native Tribunal.

The appellant now asks His Majesty in Council to discharge that order, and to remit the matter for reconsideration by the West African Court of Appeal on the grounds (1.) that the majority misconstrued the proviso in question; (2.) that the Court had jurisdiction in the proper exercise of its discretion to hear and determine the defendants' appeal notwithstanding that the provisions of s. 77, sub-s. 1, had not been complied with; (3.) that in their hypothetical use of their discretion as stated in the judgments the judges had proceeded on wrong grounds; and (4.) that, in any event, the Court should have presumed that everything had been duly performed, and that the Provincial Commissioner's Order of April 16, 1929, had been lawfully made unless and until it had been affirmatively proved that the conditions precedent to the existence of his jurisdiction had not been fulfilled.

The defendants did not appear before their Lordships' Board, so their Lordships did not have the advantage of hearing the questions argued adversely to the appellant; nevertheless, they feel no doubt that the matter should not rest where it is.

In their opinion the construction of s. 13 of the Ordinance No. 18 of 1935 is from its language reasonably plain. The word "section" admits of no doubt, it does not in its natural signification mean "sub-section," and it certainly cannot mean it in a section which itself uses both words in its opening line. The only possible ground for suggesting the contrary (for the marginal note must be disregarded) is that s. 13 enacts that "sub-section 2 . . . . shall be "amended"; but the word "amended" in that context need mean no more than "altered," and is not inconsistent with the alteration introduced into that sub-section operating as a qualification of the whole section. Their Lordships agree with the opinion of the Chief Justice of the Gold Coast.

The Court of Appeal had accordingly jurisdiction to hear and determine the appeal on its merits, if in its discretion it thought proper to do so. The judges have intimated that, upon the hypothesis of jurisdiction, they would not exercise their discretion in favour of hearing the appeal. To that extent they have hypothetically used their discretion; but they have also stated the grounds upon which they would in this case exercise their discretion in the particular way indicated. They say that since the granting of leave under s. 77, sub-s. 1, is discretionary in the Paramount Chief's Tribunal, and might be refused there, an appeal should not be entertained (i.e., the discretion given by the proviso should never be exercised) in cases where the essential step of applying to that Tribunal has been omitted. This view, however, would reduce the operation of the proviso on s. 77, sub-s. 1, to which ex hypothesi it applies, to a nullity. Their Lordships are accordingly of opinion that the Court of Appeal has, in the present case, exercised the discretion conferred upon it on wrong grounds.

Their Lordships do not feel able in the present case to act upon the presumption that leave to appeal was asked for, and was refused, by the Paramount Chief's Tribunal; the fact that the affidavit above mentioned is silent upon the point is an important fact in this connection. On the other hand, it may be doubtful whether the absence of a record on the files of the Tribunal is necessarily conclusive. That is a question which can best be answered by those who are familiar with the degree of care and accuracy with which such records and files are kept. It is, however, a matter into which further inquiry might well be made, and upon which any communication authorized by the Paramount Chief would be of value.

In the result, their Lordships are of opinion that the order appealed from should be discharged, and the appeal remitted for rehearing to the West African Court of Appeal. Their Lordships will humbly advise His Majesty accordingly.

On such rehearing, if and when satisfied that the provisions of s. 77, sub-s. 1, have not been observed, the discretion

J. C.
1939
ADABLA
v.
GBEVLO
AGAMA.

conferred by the proviso in question should be exercised after a consideration of the relevant facts subsequent to the original judgment, including, their Lordships would suggest, the question whether the omission to apply to the Paramount Chief's Tribunal for leave to appeal was deliberate or accidental or the result of a bona fide mistake. If the Court decides to exercise the discretion in favour of hearing the appeal, it will do so on such terms and conditions as it may deem just.

The respondents must pay the costs of this appeal.

Solicitors for appellant: *Sydney Redfern & Co.*

[PRIVY COUNCIL.]

J. C.*

1939

May 23.

SAADAT KAMEL HANUM . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR PALESTINE RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Wakf—Action by mutawalli to recover wakf property—Limitation—Time from which period of limitation runs—Function of illustrations in legislative enactments—Ottoman Civil Code (Mejelle), Book XIV., arts. 1660–1667.

In an action to recover property of a wakf for the benefit of all persons then interested or thereafter to become interested therein, and which fell directly under art. 1661 of the Ottoman Civil Code (the Mejelle) and its example, the period of thirty-six years specified in art. 1661 began to run from the time when the right of recovery of the property could first have been asserted by any one on behalf of those interested therein in praesenti or in futuro. It was not intended by the Code that in such a case as the present time should begin to run afresh by reason either that the office of mutawalli had passed to a new incumbent, or that an interest had accrued to a new beneficiary, and the action was neither within the principle of art. 1667 nor within its second example.

Muzaffer Bey v. *W. Collet* (1904) 6 Cyprus L. R. 108, at 109, referred to.

It is outside the proper scope of an illustration or example explanatory of a legislative enactment to convey special legislation for a particular type of case: its function, on the contrary, is to show how the principle already enunciated in the section of the enactment to which the illustration is appended is to be applied, or how the particular facts of the case supposed by the illustration come under the principle.

Judgment of the Supreme Court of Palestine (1933) L. R. of Palestine (1920–1933), 866, affirmed.

APPEAL (No. 2 of 1936) from a judgment of the Supreme Court of Palestine (November 30, 1933) affirming a judgment of the Land Court of Haifa (July 31, 1932).

The action out of which this appeal arose was brought by the appellant, Saadat Kamel Hanum, as mutawalli of, and a beneficiary under, a wakf created by one Ali Pasha by a wakf deed in about 1812, against the respondent, the Attorney-General for Palestine on behalf of the Government of Palestine, to recover two properties, one now known as Kishleh, situated in Acre, and used as a prison, and the other, known as the Dubaya, some little way outside Acre, and used by the Government as a depot and stables, both properties having been in the occupation and possession of the Palestine Government or the former Turkish Government for more than thirty-six years preceding the date of the bringing of the action. The appellant, in her amended statement of claim, dated March 27, 1932, claimed that both properties were in the wakf created by Ali Pasha, but that they had been illegally registered in the name of the Government, and she claimed that the registration should be cancelled, and that judgment should be entered adjudging both properties as wakf property.

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* *Present:* LORD RUSSELL OF KILLOWEN, LORD ROMER, and SIR GEORGE RANKIN.

The respondent, in his defence, admitted that the Kishleh property was registered in the name of the Government, but denied that it was included in, or in any way coincided with, the boundaries of the Kishleh as shown in the wakf deed of Ali Pasha. He also denied that the Dubaya was ever wakf, or was ever the mulk of the appellant or her predecessors. Alternatively, he pleaded that the appellant's claim was as regards both properties barred by prescription.

The facts, the relevant provisions of the wakf deed and of the Turkish Civil Code appear from the judgment of the Judicial Committee.

The Land Court of Haifa, before whom the action came, adjudicated only upon the question whether or not under the material articles of the Mejelle the appellant's claim was in any event barred by prescription. The two judges constituting the Court were divided in opinion, and in the result the appellant's claim was dismissed. The President of the Court was of opinion that the claim was barred by limitation on the ground that art. 1661 of the Mejelle—which provided a prescription period of thirty-six years—should be applied rather than art. 1667, while Aziz J. was of opinion that art. 1667 was applicable to this case and that the claim was not barred.

An appeal by the present appellant to the Supreme Court of Palestine (Corrie A.C.J., Khaldi and Khayat JJ.) was dismissed. The Court, whose judgment was delivered by Corrie A.C.J., construed art. 1667 as applicable only to cases in which the children of the second generation had no right to bring an action while the children of the first generation were alive. There was, the Court found, no such provision in the present deed, and art. 1667 was not applicable, and the claim was barred under art. 1661. The appeal is reported at (1933) L. R. of Palestine (1920–1933), 866.

1939. April 25, 27. *J. M. Gover K.C.* and *Wilfrid Hunt* for the appellant. The only issue in the action was one of limitation. The defence, in effect, was that on the true construction and effect of certain articles of the Turkish Civil Code the appellant's right of action was barred because the action had not been brought within thirty-six years of possession being taken by the defendant or his predecessors. [Reference was made to arts. 1660 to 1675 of the Mejelle (C. A. Hooper's translation).] If art. 1661 were the only one which applied to this case, there is no question but that the action would be barred. The other material article is art. 1667, the general principle of which appears from the first three lines: "The period of limitation begins to run as "from the date at which the plaintiff had the right to bring "an action in respect to the subject-matter of his claim." It was on the second example to art. 1667 that the decision against the appellant was given in the Supreme Court: that example shows that what is to be considered for the purposes of these articles with regard to limitation is not the position of the actual plaintiff, but the position of the beneficiaries. The Supreme Court were of the opinion that art. 1667 would undoubtedly qualify art. 1661, but held that the appellant had to bring herself within the exact case mentioned in the second example to art. 1667 in order to get the benefit of that article, and said that she had not done so because in

J. C.
1939
SAADAT KAMEL HANUM v. ATTORNEY-GENERAL FOR PALESTINE.

their view this wakf, on its construction, was not one limited to the benefit of the children for generation to generation. In regard to this particular wakf, however, there had been a decision of the Sharia Court in which it was held that this wakf was one from generation to generation. That decision, it is submitted, was binding on the Supreme Court. [On the nature of a wakf reference was made to Omer Hilmi on A Treatise of the Laws of Evqaf (1899), arts. 1 and 2; to The Land Law of Palestine, by F. Goadby and M. Doukhan (1935), 69, 72, 75; and to *Vidya Varuthi Thirtha* v. *Balusami Ayyar*. (1)] It is submitted that this is a wakf from generation to generation, and as each generation ceases to exist the next generation takes on a completely new footing. The Supreme Court was wrong in holding that the action must necessarily be brought within the scope of the second example to art. 1667. If it can be shown that the action was one to recover property belonging to a wakf, the wakf being not exactly of the kind mentioned in the article, the article would apply none the less according to the circumstance that it could be shown that the plaintiff's right had not arisen more than thirty-six years ago.

In any event, it is submitted that this wakf is in fact within the meaning of the second example to art. 1667; the Sharia Court has held that it is a wakf from generation to generation, and the Sharia Court has exclusive jurisdiction in matters of the constitution of a wakf. As to how actions on behalf of a wakf can be brought, see Omer Hilmi's Treatise of the Laws of Evqaf (1899), arts. 460 and 452, and, on the appointment of a mutawalli, arts. 291 and 292. [Reference was also made to The Ottoman Land Laws, by R. C. Tute, note 3 on p. 12, and note 5 on p. 13; to art. 478 of Omer Hilmi's Laws of Evqaf, and to p. 262 of The Land Law of Palestine, by F. Goadby and M. Doukhan (supra).] Whichever way the matter is looked at, whether from the point of view of a mutawalli or a beneficiary, the answer is the same—the cause of action as mutawalli arose when she was appointed mutawalli. On the bare point as to prescription running

(1) (1921) L. R. 48 I. A. 302, 312.

against a mutawalli as such, there is authority to the effect that any act of one mutawalli cannot estop a subsequent mutawalli: *Sheikh Sadek Anabtawi and Others* v. *Fares Ahmad and Others.* (1)

It is submitted, first, that the Supreme Court was wrong in its view that the operation of art. 1667 is confined to a wakf in the exact terms of the example given. The primary words of that article are in the first sentence. The question whether the examples limit the generality of the rule is dealt with in vol. ii., at pp. 19 and 20, of Hooper's translation of the Mejelle; the same sort of point has been dealt with in other colonial legislation: *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (2): see also The Land Law of Palestine, by F. Goadby and M. Doukhan (1935), at p. 255. It is contended, secondly, that in any event, even assuming the first submission is wrong, this particular action is one brought in regard to a wakf of the very kind mentioned in example 2 to art. 1667. In other words, it is a wakf limited to children from generation to generation. The Supreme Court should have regarded the decision of the Sharia Court as conclusive.

Wilfrid Hunt followed.

Sir Donald Somervell A.-G., Kenelm Preedy and *S. G. Vesey-FitzGerald* for the respondent. It is common ground that the decision in this case turns on the proper construction of the relevant articles of the Mejelle. The construction which the appellant seeks to put upon art. 1661 and its example is an impossible one, and one which this Board ought not to give effect to. According to the argument for the appellant there appears to be no escape from the view that the article and its example only apply to the hypothetical case of a man who has already been mutawalli for thirty-six years and, in the thirty-seventh or later year of *his* mutawalliship proceeds to bring an action. It is impossible when one is faced with a thirty-six year period to construe it as only applicable to a single person—and not indeed for the whole of his lifetime, but only for the period during which he held

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(1) (1928) L. R. of Palestine (1920–1933), 269.
(2) [1916] 2 A. C. 575, 581.

J. C.
1939
SAADAT KAMEL HANUM
v.
ATTORNEY-GENERAL FOR PALESTINE.

office. This contention is based on the fact that thirty-six years is three years longer than the average length of a generation is supposed to be. If it had been intended that an individual mutawalli should lose his right after thirty-six years the example would have been quite different: the example is clearly worded to cover the claim in respect of the wakf whatever the identity of the mutawalli may be or may have been. Art. 1661 is absolute in its nature—no one disputes that it is dealing with the pious form of proceedings with which the present matter is concerned. This is a case in which the Turkish Government, succeeded by the British Government, has held these properties for more than thirty-six years; it is a case in which the mutawalli of a pious foundation brings an action claiming that the properties belong to his pious foundation: art. 1661 therefore exactly fits. The words are " they shall not be heard in any event "; there is an express provision dealing with these trusts, and a long period of prescription given and said to be absolute.

With regard to art. 1667, it is not dealing with this class of action at all. Assuming that there was no example two in art. 1667, no one could suggest, it is submitted, that that article drives a coach and horses through art. 1661. If there were no example two to art. 1667, no question could arise, because art. 1661 is dealing perfectly clearly with a special subject-matter. This is not an action brought by children, and the second example to art. 1667 should be restricted to claims by children. Assuming against that argument, however, that that example must be read as applying to mutawalli cations of the present kind, then having regard to art. 1661 in its generality the example must be restricted to wakfs of the special character prescribed. That is what the Supreme Court have said. On what principle can the restriction to the exact example be justified? If it is sought to apply the article to a case of this kind, the result is chaos. It is submitted that art. 145 of Omer Hilmi's Treatise of the Laws of Evqaf (1899) has nothing to do with the question of the application of the principle of art. 1661 to a wakf deed of the present kind. This case is stronger than *Sheikh Mahmud* *ed Dajani and Others* v. *Shafiqah Abder Rahman es Sadiq and Others.* (1) [Reference was also made to Omer Hilmi, at pp. 111 and 112, and on the jurisdiction of the Sharia Courts to pp. 72 and 73 of the Land Laws of Palestine, by F. Goadby and M. Doukhan (1935).] Finally, there is a principle enunciated in some of the decisions of the Courts in India that quite apart from the specific period of prescription, which may be inoperative in certain cases, the Court, if there has been possession for a very long time—from a time as to which nobody now living could possibly given evidence—will presume that that possession is legal if there are circumstances in which a legal transfer of ownership or possession could be made.

S. G. Vesey-FitzGerald followed.

J. M. Gover K.C. replied.

May 23. The judgment of their Lordships was delivered by SIR GEORGE RANKIN. In this case the appellant's suit has been dismissed as barred by limitation, and the sole question is whether the dismissal is justified upon a true construction of the relevant provisions of the Mejelle.

By a deed of wakf (*wakfieh*), dated 11th Muharram, 1228 A.H. (1812 A.D.), Emir Ali Pasha made wakf of a number of properties, directing that the income should be applied in the first place to the upkeep of a certain mosque and fountain. As regards the balance of income, he directed that it should be paid or distributed to himself for his life, and after his death to his three children, Abdulla, Miriam and Hanifeh, and their children. " Then after them it shall be "for their children, then to their grand-children and then to "their great-grand-children, etc., etc., and so on, males and "females according to the Sharia distribution viz. the share "of a male shall be twice as much as that of a female and for "their descendants after them as long as they live and "continually as they generate, provided that any one of them "who dies leaving after him a child, or a grand-child or a great-

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(1) Collection of Judgments of the Courts of Palestine, vol. v, 1918–1933, pp. 1850, 1856.

J. C.
1939
Saadat Kamel Hanum v. Attorney-General for Palestine.

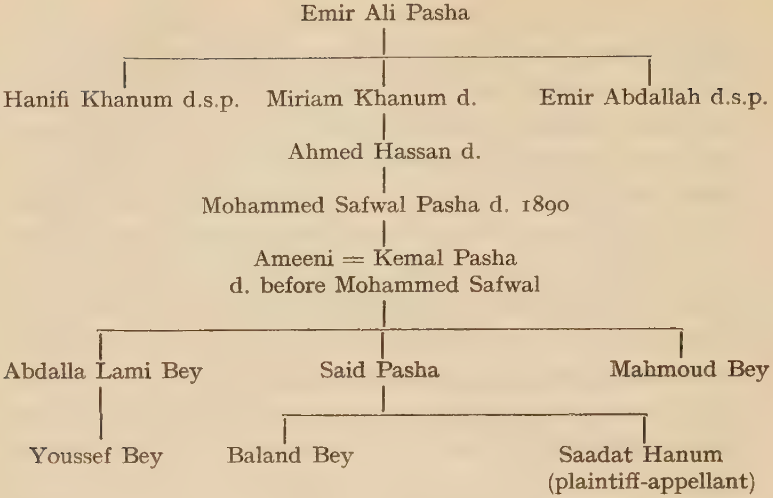
"grand-child his share shall pass down to his child or grand-"child or great-grand-child. When one of them dies leaving "after him no child, or grand-child or great-grand-child, then "his share shall pass down to those who are of his category. "The upper category (ascendants) shall enjoy it before the "lower category (descendants) and the parents shall enjoy "it before the children but not before the children of other "beneficiaries. When one of them dies leaving after him a "child, or grand-child or a great-grand-child, before becoming "a beneficiary to anything in the Waqf, then his child, or "grand-child, or great-grand-child shall become beneficiaries "to the share of their father, as if he were alive. One of them "may enjoy it independently in the event if he alone remains "alive."

In case of failure of all descendants, there was a provision that the money was to be expended for the benefit of two named mosques, and that, if this should not be feasible, it should be spent on the poor.

The provision as to the office of mutawalli was as follows: "The second condition is that the Mutawalliship shall be "vested in His honoured son Abdallah Bey Salhashoor Khassa, "and then after him it will devolve on the most prudent "amongst the male children (descendants) of the dedicator, "then after them it shall devolve on the most prudent amongst "the female children and then it shall devolve on the most "prudent amongst their grand-children and great-grand-"children, etc., etc., and so on. If they (Waqf properties) "revert to both honoured Harams (Mosques), then the "Management shall be vested in the Nazir (manager of both "of them)."

The appellant, Saadat Kamel Hanum, claims to be descended from Ali Pasha through his daughter Miriam in the manner disclosed by the pedigree table hereunder :—

J. C.
1939
SAADAT KAMEL HANUM
v.
ATTORNEY-GENERAL FOR PALESTINE.


Emir Ali Pasha
Hanifi Khanum d.s.p.
Miriam Khanum d.
Emir Abdallah d.s.p.
Ahmed Hassan d.
Mohammed Safwal Pasha d. 1890
Ameeni = Kemal Pasha
d. before Mohammed Safwal
Abdalla Lami Bey
Said Pasha
Mahmoud Bey
Youssef Bey
Baland Bey
Saadat Hanum
(plaintiff-appellant)

In 1915 the appellant's uncle, Abdalla Lami Bey, was appointed to be mutawalli, and by an order of the Sharia Court at Acre, dated January 10, 1926, the appellant was found to be more prudent than either Baland Bey or Youssef Bey, and was appointed mutawalli. This order does not expressly mention that Abdalla Lami Bey or the appellant's father, Said Pasha, had died, nor do the dates of their deaths appear from any other of the documents on the record.

On October 26, 1931, the appellant, as mutawalli and beneficiary of the wakf of Ali Pasha, brought in the Land Court, Haifa, the suit out of which the present appeal arises. She sued the Attorney-General on behalf of the Government of Palestine to recover for the wakf two properties in or near Acre as being properties comprised in the deed of 1812. The two properties are known as Kishleh and Dubaya: they have long been in the possession of the Palestine Government, the former being now used as a prison, and the latter as a depot and stables.

At the trial the only matter of defence which was dealt with by the Land Court was the question of limitation, though the learned President considered that the appellant's claim to the Dubaya must in any event fail on another ground. It does not appear that any evidence was taken upon the question of limitation. It was admitted by the appellant that for a period exceeding thirty-six years prior to the suit the properties claimed had been in the possession of the Government. On the other hand, it was conceded that she did not become mutawalli until 1926. The appellant further contended that neither she nor any of her generation had become entitled beneficially in possession until within the said period of thirty-six years: this appears to have been assumed (provisionally at least) by the Courts below, and must be taken to be true for the purposes of this appeal.

The provisions of the Mejelle (Ottoman Civil Code) upon Limitation are arts. 1660 to 1675, which form the second portion or chapter of Book XIV., which is entitled "Actions." The Courts in Palestine do not appear to be provided with any official or authoritative English version of this Code, the original of which is in the Turkish language. Several translations have been brought to the notice of their Lordships, and have been found to differ as regards the exact meaning which they attribute to important phrases in arts. 1660 and 1667. In the translation of Mr. C. A. Hooper (Jerusalem 1933) arts. 1660, 1661 and 1667 are as follows:—

"Article 1660.—Actions relating to a debt, or property "deposited for safe-keeping, or real property held in absolute "ownership, or inheritance, or actions not relating to the "fundamental constitution of a pious foundation, such as "actions relating to real property dedicated to pious purposes "leased for a single or double rent, or to pious foundations "with a condition as to the appointment of a trustee, or the "revenue of a pious foundation, or actions not relating to the "public, shall not be heard after the expiration of a period "of fifteen years since action was last taken in connection "therewith."

"Article 1661.—Actions brought by a trustee of a pious "foundation relating to the fundamental constitution thereof "or by persons maintained by such foundation may be heard "up to a period of thirty-six years. They shall not be heard "in any event, however, after the period of thirty-six years "has expired.

"Example :—

"A has held a piece of real property in absolute ownership "for a period of thirty-six years. The trustee of a pious "foundation thereupon brings an action claiming that the "piece of real property in question is part of the land "belonging to his pious foundation. The action will not be "heard."

"Article 1667.—The period of limitation begins to run as "from the date at which the plaintiff had the right to bring "an action in respect to the subject matter of his claim. "Consequently, in an action in respect to a debt repayable "at some future definite date, the period of limitation only "begins to run as from the date on which the debt fell due for "payment, since the plaintiff has no right to bring an action "in respect to the debt before the due date has arrived.

"Examples :—

"(1.) A brings an action against B claiming from him "the price of a thing sold to him fifteen years ago, subject "to a period of three years for payment of the price. The "action may be heard, since only twelve years have passed "since the date of payment arrived.

"(2.) An action is brought in regard to property dedicated "to pious purposes limited to children from generation to "generation. The period for limitation in respect to an "action brought by the children of the second generation "begins to run as from the date of the extinction of the "children of the first generation, since the children of the "second generation have no right to bring an action while "the children of the first generation are alive.

"(3.) In actions relating to a marriage portion payable "at a future date, the period of limitation begins to run "from the date of the divorce or death of one of the spouses, "since a marriage portion payable at a future date only "falls due for payment on divorce or death."

The contention of the appellant is that while her suit would doubtless fall within the terms of art. 1661, if this be considered by itself, the article has to be considered as one of a series of articles in a Code which necessarily introduces different considerations one by one ; thus, while the period of limitation applicable to this particular type of case is prescribed by art. 1661, the exceptions for minority and lunacy, and the provisions as to the terminus a quo of the period of limitation, are to be gathered from other articles in the chapter, and are to be taken into account before the terms of art. 1661 are applied to the facts of a particular case. Accordingly, she contends that art. 1667 controls or affects the application of art. 1661 ; that her case is within the principle of art. 1667, and in particular is within the exact terms of the second of the three examples mentioned thereunder.

The Land Court dismissed the appellant's suit as a result of a difference of opinion between the President and Aziz J. The learned President considered that arts. 1661 and 1667 were irreconcilable, and applied the former. Aziz J. held, under art. 1667, that " no prescription runs against cases "where generation after generation has been conditioned." On appeal to the Supreme Court, three learned judges held that the wakf in this case was not " from generation to generation " within the meaning of art. 1667, and on this ground, applying art. 1661, dismissed the appeal. Their view was (1) : " There is no inconsistency between the two "articles. Art. 1661 fixes the period of limitation in respect "of all wakfs at 36 years. Article 1667 does not deal with "the length of the period of limitation, but with the date from "which such period begins to run, in the case of waqfs of a "particular nature." To this reasoning, learned counsel for the appellant objects not only that on a true construction of its provisions Ali Pasha's wakf and the appellant's interest thereunder is within the exact terms of the example, but also that the case cannot be excluded from the article on the mere ground that it is not covered by an example.

It is clear that the meaning and effect of the second example to art. 1667 has been a matter of doubt and difficulty in the present and in other cases. In the translation by Dr. W. E. Grigsby (London 1895) the example appears in the following form : " In the same way if the instrument which consecrates

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(1) L. R. of Palestine (1920–1933), 866, 868.

J. C.
1939
SAADAT KAMEL HANUM v. ATTORNEY-GENERAL FOR PALESTINE.

"a thing to pious uses say that the descendants of the man "who consecrates it shall have the management from "generation to generation, in an action which the second "generation begins, prescription only begins from the day of "the total failure of the first generation, because while the "first generation exists those belonging to the second generation "cannot bring an action."

In the French version, by George Young (Corps de Droit Ottoman, vol. vi. (Oxford 1906)), the example is given thus : "Dans les actions relatives aux vakoufs stipulés avec "substitution aux enfants de génération en génération, la "prescription ne court pour les descendants de la seconde "génération qu'à partir du moment où il n'existe plus aucun "descendant de la première génération, car jusque-là les "descendants de la seconde génération n'ont pas droit "d'action."

In Omer Hilmi Effendi's Treatise on the Laws of Evqaf (translated by Tyser and Demetriades) (Nicosia, 1899), p. 111, the learned author gives in para. 436 two examples of the effect of the condition " from generation to generation." One shows the period of fifteen years as not applicable until the first generation has become extinct to an action claiming the office of mutawalli by children of the second generation against a stranger. The other is : "If a property of which "the Muteveliship and the income is dedicated in favour of "the children of the dedicator from generation to generation, "is sold by a child of the first generation and delivered to "another, and the purchaser receive and possess it for 35 "years, and afterwards when the first generation is wholly "extinct, the children of the second generation are appointed "Mutevelis, and after the lapse of a year they bring an action "against the purchaser, alleging that the property is wakf, "this action is heard."

The President of the Land Court has referred in his judgment to Ali Hadar Effendi as being generally considered the most authoritative commentator on the Mejelle. He states as the view of this learned author that a mutawalli's action is only barred under art. 1661 if brought by the mutawalli who was

J. C.
1939
Saadat Kamel Hanum
v.
Attorney-General for Palestine.

the cause of the failure to sue, and not if brought by a successor in the office. Now the principle of limitation may be regarded rather as grafted upon the Muslim law than as an integral part thereof originally, and the Commission which drafted the Mejelle may well have felt special difficulty in making drastic provisions which would deprive wakfs of their property. Even so, their Lordships are not able to attribute to art. 1661 an effect so slight as that which is thus suggested. That the result of a delay for so long a period as thirty-six years should last only for the balance of the time during which the same mutawalli should be in office is not, in their Lordships' view, a reasonable interpretation of this Code. No one of the learned judges in either of the Courts in Palestine proceeded on that view of the law in the present case. Aziz J., as well as the members of the Supreme Court, considered that the case must turn upon a principle or rule special to the case of wakfs when the limitation is "from generation to generation."

The general effect of the Code's provision of periods of limitation as regards wakf property was broadly stated in *Muzaffer Bey* v. *W. Collet* (1) by the Chief Justice of the Supreme Court of Cyprus: "The answer to the first question ". . . . depends on sections 1660 and 1661 of the Mejelle, "which enact that actions for the 'tassaruf' (i.e., possession), "by ijaretein or muqataa in respect of immovable wakf "property are not heard after 15 years; and that actions of "the Muteveli, or of the people who receive salary and food "from the wakf, in respect of the corpus of wakf property, "are heard up to 36 years. That is, where a man claims the "possession of property which both he and the other party "admit to be wakf, his action is heard up to 15 years; but "where he claims wakf property as trustee (Muteveli), or as "beneficiary, from a person who denies that it is wakf, his "action is heard up to 36 years."

Their Lordships think this to be a useful and succinct statement of the effect of these articles, though the word mutawalli is not properly translated by the word "trustee," and for important purposes it is necessary to bear in mind that wakf property is not vested in the mutawalli: *Vidya Varuthi Thirtha* v. *Balusami Ayyar.* (1)

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(1) (1904) 6 Cyprus L. R. 108, 109.

The principle of art. 1667 has to be considered in relation to art. 1661. It is clear, if only from art. 1661, that in some circumstances a beneficiary may sue to recover property for the wakf from some one holding adversely to the wakf. Wakfs are made of very different kinds of property, and the beneficial interests may be infinitely various. It is therefore possible for one or more beneficiaries in some circumstances to sue tenants or others directly to recover moneys as income of the wakf payable to them. And it is, of course, open to a beneficiary to put in suit against the mutawalli or other persons interested in the wakf his own immediate claim to benefit thereunder. The example given in art. 1667 does not specify the nature of the action envisaged thereby, and the question arises whether it can safely be extended to cover every kind of action which a beneficiary may bring. Dr. Grigsby's translation does not seem to be warranted in so far as it interprets the example as specially concerned with the rights of a mutawalli to bring an action. It is dealing with beneficiaries and beneficial interests.

Does the wording of the example require it to be supposed that the action by children of the second generation therein contemplated is an action brought to recover for the wakf property held adversely to it? Such an action can be brought by a beneficiary; but it would seem that it is only in special circumstances that a beneficiary and not the mutawalli is the proper plaintiff: by whomsoever brought, the right asserted by such a suit is the right of the wakf itself, and it is asserted on behalf of all interests therein, whether present or future, absolute or contingent. The assumption that what is given as an example of the principle enunciated by the opening words of art. 1667 is or includes a case of this special character is attended with difficulty. If the last surviving member of the first generation is mutawalli and is alienating or wasting the wakf property, is it a clear and obvious truth that the children of the second generation would have no right to bring an action? If not, the case does not appear to be the case given by way of example. From the mere fact that it is given by way of illustration, there is every presumption that the case put is conceived as a plain case of an action to enforce the immediate right newly accrued upon the extinction of the previous generation. Prima facie, this does not necessarily cover the whole ground, if the beneficiary, to enforce his new-found right, has first to bring a suit on behalf of all interests in the wakf.

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(1) L. R. 48 I. A. 302.

Aziz J. and the Supreme Court appear to have considered that the example makes a special rule applicable where the limitation is qualified by the condition "from generation to generation." This phrase appears in authoritative works on Mahomedan law in its Arabic form (*butnun baâd butn*) as having the intention and effect of preventing nearer and more remote descendants from being treated alike. The following passage from the Fatâwai Alamgiri, vol. ii., p. 474, explains it: "And if he should say, 'upon my child, and child of my "'child, and child of the child of my child,' mentioning three "generations, the produce is to be expended upon his children "for ever, so long as there are any descendants, and is not "to be applied to the poor; while one remains the *wakf* is "to them, and the lowest among them: the nearer and more "remote being alike unless the appropriator say in making "the *wakf*, 'the nearer is nearer,' or say, 'on my child, then "'after them on the child of my child,' or say, 'generation "'after generation' (*butnun baâd butn*), when a beginning "must be made with them with whom the appropriator has "begun." [Baillie, Digest of Moohummudan Law, 2nd ed., vol. i., p. 580. Ameer Ali, Mahommedan Law, 4th ed., vol. i., p. 353. See also Macnaghten's Moohummudan Law, 1897, p. 341, Case VIII.]

With great respect to those learned judges who seem to have thought that the example given in art. 1667 imports a special rule applicable to cases where the phrase is employed to qualify the order of succession laid down by the wakf, their Lordships think that it is outside the proper scope of an illustration or example to convey special legislation for a particular type of case. Its function, on the contrary, is to show how the principle already enunciated is to be applied, or how the particular facts of the case supposed come under the principle. The natural approach to the example is that the case is only put as an illustration of a right which has not accrued before a certain date, and without the intention of conveying any implication that the case supposed is necessarily different in principle from many other cases.

A wakf is not governed by rules against perpetuity, and successive future life interests in favour of unborn persons are valid by the Mahomedan law of wakf. The special rule "from generation to generation" has no exceptional effect to make the particular descendant whose interest accrues thereunder take by purchase and not by limitation. The effect is to make A take instead of B, or to make A take a different share than he would otherwise have taken. The particular example given may be one in which all the beneficial interests happen to arise at one and the same time. It looks as if the draftsman had in contemplation a case where descendants were to take per capita subject to the condition, though the condition may be applied equally well to qualify a stirpital order of succession [cf. Macnaghten, op. cit., p. 342; Wilson's Anglo-Muhammadan Law, 6th ed., section 324, p. 363] so that (as the present *wakfieh* puts it) parents enjoy before children, but not before children of other beneficiaries. But this special feature of the example given is not the point of the example. The right of A to a share of the income may arise according to any order of succession appointed by the wakf. It may arise on his birth, on the death of his father, or on the complete extinction of the previous generation. For purposes of putting it in suit it is a new right when it accrues. As the first of the three examples given under art. 1667 is that of a sale, with a stipulation for payment of the price in future and not at once; so the second is that of a beneficial interest which arises when the previous generation becomes extinct, and not before; and the third is a case, not

J. C.
1939
Saadat Kamel Hanum v. Attorney-General for Palestine.

of prompt, but deferred dower. These may well be intended as familiar types of case under art. 1660.

The assumption that the action referred to by the example is an action brought on behalf of all persons interested in the wakf to recover property held adversely to the wakf had led to the further assumption that the example lays down a special rule of limitation in the case of a particular kind of wakf. Their Lordships think, however, for the reasons above stated, that a more correct construction of this Code is reached without either assumption. What is required is to relate the principle laid down in art. 1667 to such a suit as the present, which comes within art. 1661. For this, it is necessary to consider with exactness what is the right asserted, and in whom is the right. That the right is not the right of a mere manager, such as is the mutawalli, is plain upon principles of Mahomedan law. Nor is a claim to recover for the wakf property held adversely to it a claim made on behalf of a particular beneficiary (though such a one may be the plaintiff), or even on behalf of all those whose beneficial interests have accrued to them at the date of suit. It is a claim made on behalf of the wakf in a sense which includes all interests therein present and future. The principle that limitation will not begin to run until the individual who is nominally and formally the plaintiff in the suit came to be in a position to sue on behalf of the wakf would render limitation to all intents and purposes inapplicable to this subject-matter; and as the office of mutawalli, though only a managership, provides continuous representation of the wakf and of all interests therein, it is not necessary to suppose that limitation is intended to be so controlled. Apart from the question whether there is any special exception provided for cases where "generation to generation" has been stipulated, their Lordships gather that the Courts in Palestine are agreed in regarding such a principle as inapplicable to such a case as the present. Cases in which there is no dispute as to the property in suit being property of the wakf give rise to different considerations—under the Mejelle to very different considerations; but the present case is under art. 1661 and

J. C.
1939
SAADAT KAMEL HANUM
v.
ATTORNEY-GENERAL FOR PALESTINE.

within the very terms of the example given thereunder. It is difficult to interpret that example as implying no more than that at the end of thirty-six years an inquiry is to be made as to changes in the office of mutawalli, or in the personnel of the beneficiaries, and that A must have held possession not for thirty-six years, but for thirty-six years after the last change of this kind took place. Their Lordships do not consider that in such a case it is intended by the Code that time should begin to run afresh by reason either that the office of mutawalli has passed to a new incumbent or that an interest has accrued to a new beneficiary. In their Lordships' opinion, in the case of an action such as the present, which is an action to recover property of the waqf for the benefit of all persons now interested or hereafter to become interested therein, and which falls directly under art. 1661 and its example, the period of thirty-six years begins to run from the time the right of recovery could first have been asserted by any one on behalf of those interested therein in praesenti or in futuro. Such an action is neither within the principle of art. 1667 nor within its second example.

They will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the respondent's costs of the appeal.

Solicitors for the appellant : *Stoneham & Sons.*

Solicitors for the respondent : *Burchells.*

[PRIVY COUNCIL.]

TAN MA SHWE ZIN AND OTHERS . . APPELLANTS ;

AND

KHOO SOO CHONG AND OTHERS . . RESPONDENTS.

J. C.*
1939
June 22.

ON APPEAL FROM THE HIGH COURT AT RANGOON.

Burma—Succession to estate of Chinese Buddhist—Burmese Buddhist law applicable—Chinese customary law—Burma Laws Act (*XIII. of* 1898), *s.* 13, *sub-ss.* 1, 2, 3—*Construction.*

By s. 13 of the Burma Laws Act, 1898: "(1.) Where in any "suit or other proceeding in Burma it is necessary for the Court "to decide any question regarding succession, inheritance, ... "(*a*) the Buddhist law in cases where the parties are Buddhists ". . . . shall form the rule of decision, except in so far as such "law . . . . is opposed to any custom having the force of law."

The respondent, alleging that Chinese customary law governed inheritance and succession to Chinese Buddhists in Burma, claimed as nephew to be the sole heir to the estates of his uncle and the uncle's widow, both Chinese Buddhists who were domiciled in, and who died in, Burma:—

Held, that a Chinaman who is a Buddhist comes within the term "Buddhists" in cl. (*a*) of sub-s. 1 of s. 13 of the Burma Laws Act, 1898, and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or because the law which would govern him in China is not a specifically Buddhist or even a religious law. The same is true of the word "Buddhist" in the Indian Succession Act (XXXIX. of 1925). Burmese Buddhist law was therefore applicable to the appellant's uncle and aunt, and according to that law his claim to be heir to either failed.

The Burma Laws Act does not admit of being interpreted in such a sense that Buddhist law is only to be applied to Buddhists if it be the law prevailing in the country of their origin.

Dictum of Mr. Burgess, Judicial Commissioner, in *Ma Tin* v. *Doop Raj Barna*, Chan-Toon L. C., vol. i., 370, at 372, approved.

Decree of the High Court at Rangoon reversed.

APPEAL (No. 58 of 1938) from a decree of the High Court at Rangoon (Division Bench) (March 1, 1937), reversing a decree of the same High Court passed in its original jurisdiction (June 3, 1936).

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* *Present*: LORD RUSSELL OF KILLOWEN, SIR GEORGE RANKIN, and MR. M. R. JAYAKAR.

The plaintiff in the action out of which this appeal arose was the first respondent, Khoo Soo Chong, who claimed (inter alia) that as nephew he was the sole heir to the estates of his uncle, Khoo Boon Tin, and his uncle's widow, Tan Ma Thin, both Chinese Buddhists who had been domiciled in, and who had died in, Burma, on the footing that Chinese customary law governed inheritance and succession to Chinese Buddhists in Burma. The defendants, the present appellants, were the sisters and brother of the widow Tan Ma Thin, who in a previous action (1) had been held to be entitled to the property not disposed of by the will of Tan Ma Thin.

The main question in this appeal, which turned upon the construction of s. 13 of the Burma Laws Act (XIII. of 1898), was what law was to be applied by the High Court at Rangoon to determine the person or persons entitled to succeed to the property in Burma of a Chinese Buddhist who was domiciled in Burma at the date of his death.

The trial judge (Sen J.) and, on appeal, the Division Bench (Roberts C.J. and Leach J.) held that Chinese customary law governed the case; and in the result the Division Bench held that the plaintiff was entitled to the inheritance.

The facts, and the terms of s. 13 of the Burma Laws Act, 1898, appear from the judgment of the Judicial Committee.

1939. May 16, 18, 19, 22. *A. M. Dunne K.C.* and *A. P. Pennell* for the appellants.

W. Wallach for the first respondent.

In addition to the cases referred to in the judgment of the Judicial Committee the following cases were cited in argument: *Thein Shin* v. *Ah Shein* (2); *Maung Po Maung* v. *Ma Pyit Ya* (3); *Ma Sein* v. *Ma Pan Nyun* (4); *Ma Sein Byu* v. *Khoo Soon Thye* (5); *Mah Nhin Bwin* v. *U. Schwe Gone* (6); *Ma Pwa* v. *Yu Lwai* (7); *Kyin Wet* v. *Ma Gyôk* (8); and *Maung Dwe* v. *Khoo Haung Shein.* (9)

(1) (1932) I. L. R. 10 R. 97.
(2) (1914) 8 L. B. R. 222.
(3) (1923) I. L. R. 1 R. 161.
(4) (1924) I. L. R. 2 R. 94.
(5) (1933) I. L. R, 11 R. 310.
(6) (1914) L. R. 41 I. A. 121.
(7) (1916) 8 L. B. R. 404.
(8) (1918) 9 L. B. R. 179.
(9) (1924) L. R. 52 I. A. 73.

J. C.
1939
Tan Ma Shwe Zin v. Khoo Soo Chong.

June 22. The judgment of their Lordships was delivered by Sir George Rankin. The suit out of which this appeal has arisen was brought on March 7, 1934, by the first respondent, Khoo Soo Chong, in the High Court at Rangoon in its original civil jurisdiction. The purpose of the suit was to establish that the plaintiff is the sole heir to the estates of his uncle, Khoo Boon Tin, and of Tan Ma Thin, this uncle's widow, either (1.) as their adopted son, or (2.) as the former's nephew. It has been held in the High Court, both at first instance and on appeal, that the plaintiff failed to prove that the alleged adoption was in fact made, and though this issue has been raised again before the Board, their Lordships see no reason to disturb the concurrent findings on this point.

The facts which bear upon the plaintiff's claim as nephew may be shortly stated. His uncle, Khoo Boon Tin, was the eldest of four sons of a Chinaman who lived in Burma. The family professed the Buddhist religion, and Khoo Boon Tin married Tan Ma Thin, also a Chinese and a Buddhist. He died in 1906, childless. Of his three brothers, the second son had predeceased him leaving no children. The third, Khoo Htwa Khan, survived till 1917, and died leaving three sons of whom the plaintiff is the eldest, having been born on March 31, 1905. The fourth son, Khoo Hine Htow, was alive at the time of the present suit, and gave evidence at the trial for the plaintiff.

On the death of Khoo Boon Tin in 1906, his widow, Tan Ma Thin, entered into possession of his property, obtained letters of administration to his estate from the Chief Court, carried on his business and engaged in other business. She died on April 14, 1929, having made a will, dated June 29, 1927. Her estate was sworn at over two lakhs of rupees. Probate was obtained of the will from the High Court on August 24, 1929. By it she had made a number of charitable and other bequests, including a legacy of Rs.2000 to the plaintiff, but she had made no residuary bequest, and part of her property was not disposed of by her will. If the Indian Succession Act applied to her will, the charitable bequests were invalid under s. 118 thereof, as the will had not been deposited in accordance with the terms of that section.

On November 24, 1930, her sister, the first appellant, sued on the Original Side of the High Court for administration of her estate, claiming that the present appellants (that is, herself, her sister and her brother) were the only heirs, and that the charitable bequests were invalid. The present plaintiff was not impleaded, and the suit proceeded against the other sister of the testatrix, her brother and her executors. The trial judge upheld the charitable bequests on the ground that the will was governed by English law and not by the Indian Succession Act; but on appeal Page C.J. and Cunliffe J. [*Tan Ma Shwe Zin* v. *Tan Ma Ngwe Zin* (1)] held that the law to be applied to "Chinese Buddhists" was Chinese customary law, and remanded the case. On remand it was held by Sen J. (July 11, 1933) that the charitable bequests were valid, and that each of the present appellants was entitled to one-third of the property not disposed of by the will.

Thereafter, on March 7, 1934, some twenty-eight years after the death of his uncle and about five years after the death of his aunt, the respondent by his plaint in the present suit claimed that he was sole heir to both, on the footing that Chinese customary law governed inheritance and succession to Chinese Buddhists in Burma, and that in any case the widow had only a limited interest in her husband's estate, and had no right to dispose of it. In the High Court both the trial judge (Sen J.), and the Division Bench (Roberts C.J. and Leach J.) on appeal from him, held that Chinese customary law governed the case. But the trial judge was not satisfied that under that law a childless widow had no rights in her husband's estate or in her own personal estate acquired after the death of her husband. By his decree, dated June 3, 1930, he dismissed the suit.

The Division Bench, however, proceeding largely upon Jamieson's "Chinese Family and Commercial Law," held in

(1) (1932) I. L. R. 10 R. 97.

favour of the plaintiff that on the death of his uncle the plaintiff should have been adopted by the agnates, and was entitled to the inheritance; that a wife is entitled to no estate of her own, as all she brings to her husband, or receives, vests in her husband's family; but that, as she is entitled to be in control of the inheritance during her life, time did not run against the plaintiff till the death of Tan Ma Thin in 1929. The result of this decision was an order that an account be taken to ascertain what the plaintiff was entitled to, with a direction that the only property to be excluded as property of Tan Ma Thin to which the plaintiff was not entitled was "ornaments and jewellery and valuables of the "like nature, together with silk stuffs and all property of "whatever kind as [*sic*] may have been given by her husband "to her in his lifetime."

The plaintiff can maintain this decree only if he establishes (1.) that Chinese customary law governs the succession, (2.) that under it the eldest son of the younger brother of the propositus takes in preference to his widow if he died childless, and (3.) that in her lifetime the widow is entitled to possession of the estate, so that her possession is not adverse to the nephew. By this appeal the two sisters and the brother of the widow challenge each of these propositions.

The first question is as to the law to be applied by the High Court at Rangoon to determine the person or persons entitled to succeed to the property in Burma of a Chinaman who was a Buddhist and who was domiciled in Burma at the date of his death. This question depends upon the true construction and effect of s. 13 of the Burma Laws Act (XIII. of 1898):—

"(1.) Where in any suit or other proceeding in Burma it "is necessary for the Court to decide any question regarding "succession, inheritance, marriage or caste, or any religious "usage or institution—

"(*a*) the Buddhist Law in cases where the parties are "Buddhists,

"(*b*) the Muhammadan Law in cases where the parties are "Muhammadans, and

"(*c*) the Hindu Law in the cases where the parties are "Hindus,
"shall form the rule of decision, except in so far as such law "has by enactment been altered or abolished, or is opposed "to any custom having the force of law.

"(2.) Subject to the provisions of sub-section 1 and of "any other enactment for the time being in force, all questions "arising in civil cases instituted in the Courts of Rangoon "shall be dealt with and determined according to the law "for the time being administered by the High Court of "Judicature at Fort William in Bengal in the exercise of its "ordinary original civil jurisdiction.

"(3.) In cases not provided for by sub-section 1 or sub-"section 2, or by any other enactment for the time being in "force, the decision shall be according to justice, equity and "good conscience."

This section is in similar terms to those of ss. 6 and 7 of Act VII. of 1872, ss. 4 and 5 of Act XVII. of 1875, and s. 4 of Act XI. of 1889. These enactments introduced into Burma a distinction which arose in Bengal as regards the law applied to Indians (1.) throughout the province by the Company's Courts and (2.) within the town of Calcutta by the Supreme Court. Sub-ss. 1 and 3 of s. 13 above set forth correspond to the provision first made by Warren Hastings in 1772, later incorporated in s. 15 of Regulation IV. of 1793, and now to be found in s. 37 of the Bengal, Agra and Assam Civil Courts Act, 1887. This prescribed the law to be applied by the civil courts throughout the province of Bengal; it had special reference to what may be called family law and religious institutions, leaving other matters to the general principles of justice; it contemplated two classes only—Mahomedans and Hindus. In applying it to Burma the Indian Legislature put Buddhists on the same footing as Mahomedans and Hindus, and "the Buddhist law" on the same level as the Mahomedan and Hindu laws. It introduced at the same time an express saving for custom which the Bengal enactments had never contained. Sub-s. 2 above cited points to the provision made by s. 17 of 21 Geo. 3, c. 70, whereby jurisdiction within

Calcutta was given or confirmed to the Supreme Court over Indians, but the law of England, which would otherwise have been the general rule of decision applied by the Court within Calcutta, was excluded in favour of the Hindu or Mahomedan law so far as regards the matters mentioned in the section. This provision, when re-enacted in 1915 in the Government of India Act, s. 112, was generalized, and is not now limited by any specific reference to particular races or religions. It was never at any time confined to family and religious matters; it included "all matters of contract and dealing between party "and party."

That these two different methods should have existed side by side for so long, and should from 1872 have been applied to Burma, is a remarkable fact—only in part explained by the consideration that over a wide field express legislation has in the interval superseded both: statutory codes like the Indian Contract Act and the Transfer of Property Act having provided for many matters a law common to all races and religions. As the present suit was instituted in the High Court, if not concluded by the provisions of sub-s. 1, it will fall to be decided, if possible, under sub-s. 2.

In the application of sub-s. 1 of s. 13 above cited, difficulty has arisen out of the immigration into Burma of Chinamen, some of whom profess the Buddhist faith. It does not appear that there is any Chinese form of Buddhist law, and as regards succession and inheritance the Chinaman who is a Buddhist is in China governed by customs or laws which are not connected with the religious beliefs of Buddhists, and are applied equally to Chinamen who are not Buddhists. This is referred to as Chinese customary law, though it would seem that in or about 1930 a new code was introduced in China, and that parts of the "customary law" have from of old been codified. For a number of years the Courts in Burma have been in doubt as to the effect to be given to sub-s. 1 in these circumstances. In 1881 the difficulty was noticed by Sir John Jardine in *Hong Ku* v. *Ma Thin* (1): "We all know that the Courts apply "different systems of both Hindu and Mahomedan law to

(1) (1881) L. B. Selected Judgments, 135, 144.

J. C.
1939
TAN MA SHWE ZIN
v.
KHOO SOO CHONG

"people belonging to different races, countries, or sects. I "doubt therefore whether it is obligatory on our Courts here "to apply the Burman Buddhist law to Buddhists from "Ceylon or China."

In *Fone Lan* v. *Ma Gyee* (1), Sir Charles Fox considered that by the words Mahomedan law and Hindu law the Legislature meant (2) "the laws applicable to such Mahommedan and "Hindu parties whencesoever such laws may be derived" and that "the terms 'Buddhist law' in the section must be "read in the same way, namely, as meaning the law of succes- "sion, inheritance, marriage, etc., applicable to the Buddhist "parties in the case." "The personal law," he held, "is left "to all who are exempted from the operation of the Indian "Succession Act." (3) Accordingly he applied the Chinese customary law to the claim of the plaintiff to be an adopted daughter and to succeed to the estate of a Chinese Buddhist. This view was followed in a considerable number of cases, though it had been dissented from in *Apana Charan Chowdry* v. *Shwe Nu* (4). In *Man Han* v. *R. M. A. L. Firm* (5) Chari J. considered that Chinese customary law had been applied as equity under sub-s. 3; he doubted the equity of this, but agreed that Burmese Buddhist law should not be held applicable. He said (6): "The provision of the Burma Laws "Act that Buddhist Law shall apply in cases where the parties "are Buddhists presupposes the existence of a Buddhist Law "applicable to the particular class of Buddhist before the "Court."

In *In re Ma Yin Mya* v. *Tan Yauk Pu* (7) Maung Ba J. referred to a Full Bench the question of the law to be applied to marriages in Burma between Chinese Buddhists. The question seems to have related to the form or ceremonial of marriage, and the discussion was to some extent clogged with questions as to mixed marriages between Chinamen and Burmese women. It was held that the Burmese Buddhist law was applicable as the lex loci contractus, and that to escape from it a Chinaman must prove a custom contrary thereto. Thereafter, the Division Bench which dealt with *Man Han's* case on appeal (1), applied Burmese Buddhist law to the question whether a judgment creditor of a Chinese Buddhist could levy execution on the wife's share of their joint property.

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(1) (1903) 2 L. B. R. 95.
(2) Ibid. 97.
(3) Ibid. 98.
(4) (1907) 4 L. B. R. 124.
(5) (1926) I. L. R. 4 R. 110.
(6) Ibid. 114.
(7) (1927) I. L. R. 5 R. 406.

In *Chan Pyu* v. *Saw Sin* (2) Pratt J. regarded the Full Bench decision as applicable to the "law of marriage" only, and not to the "law of inheritance," and agreed with what Sir Charles Fox had said in *Fone Lan's* case (3), which he regarded as settled law. Cunliffe J. disagreed with the Full Bench decision, but thought it binding, though only as to marriage. He appears to have considered that "Buddhist law" could not mean Burmese Buddhist law unless "Buddhists" was confined to Burmese Buddhists.

Thereupon, in *Phan Tiyok* v. *Lim Kyin Kauk* (4), there was referred to a Full Bench the question : Does Burmese Buddhist law govern the succession to the estate of a Chinese Buddhist born in China but who was domiciled and died in Burma ? All five members of the Full Bench answered this question in the negative ; but they varied in opinion as to the law which does govern such succession. The suit in that case had been brought in the District Court of Amherst. Otter J. considered that Chinese customary law was to be applied, though a Chinese Buddhist was just as much a Buddhist as a Burmese Buddhist. Heald A.C.J. and Chari J. thought that Chinese Buddhists were not Buddhists within the meaning of the section or of the exceptions to the Indian Succession Act, and that the Indian Succession Act applied to them proprio vigore. Maung Ba J. and Brown J. thought that the Chinese Buddhist is a Buddhist within the section, but that the provisions of the Indian Succession Act applied to him as a matter of justice, equity and good conscience under sub-s. 3.

In 1932, as already mentioned, the suit brought by the first appellant in the High Court to administer the estate of her sister Tan Ma Thin came before Page C.J. and Cunliffe J. (5)

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(1) (1927) I. L. R. 5 R. 443.
(2) (1928) I. L. R. 6 R. 623.
(3) 2 L. B. R. 95.
(4) (1930) I. L. R. 8 R. 57.
(5) (1932) I. L. R. 10 R. 97.

J. C.
1939
TAN MA SHWE ZIN
v.
KHOO SOO CHONG.

The appeal was from Dunkley J., who had held that English law must govern the succession as a matter of justice, equity and good conscience under sub-s. 3. The Division Bench did not regard itself as bound by the Full Bench decision in *Phan Tiyok's* case (1) to apply the English law or the rules of the Indian Succession Act, as the only question referred to the Full Bench had been the question whether Burmese Buddhist law applied. Page C.J., with whom Cunliffe J. agreed, held that a Chinese Buddhist is a Buddhist within the meaning of the Burma Laws Act and the Indian Succession Act, and that the case fell accordingly within the first sub-section of s. 13. Applying sub-s. 1 he proceeded on the ground that it was a fundamental principle of British policy that the particular habits and customs of the various communities under British rule should be recognized and respected. He said (2): "But the language in which the section is couched is unfor-"tunate, for there is no law by which all Hindus or all "Mahomedans are governed, and in the strict sense of the "term no Buddhist law at all. The system of law applicable "to Sunni Mahomedans differs from that to which Shiah "Mahomedans are subject; Hindus who follow the Benares "school are governed by the Mitakshara, those who follow "the Bengal school by the Dayabhaga; while in the religious "system known as Buddhism no rules of law concerning secular "matters are laid down or prescribed. Bearing in mind the "object that the Legislature had in view, however, the "meaning and effect of the expressions 'Buddhist Law,' "'Mahomedan Law' and 'Hindu Law' in section 13, in my "opinion, is plain, and section 13 (I.) must be construed as "laying down that in 'any question regarding succession, "'inheritance, marriage or caste or any religious usage or "'institution' where the parties profess the Buddhist or "Mahomedan or Hindu religion the rule of decision shall be "the personal law that governs the community or religious "denomination to which the parties belong, except in so far "as their personal law in Burma 'has by enactment been "'altered or abolished, or is opposed to any custom having

(1) (1930) I. L. R. 8 R. 57.

(2) I. L. R. 10 R. 103.

J. C.
1939
Tan Ma Shwe Zin
v.
Khoo Soo Chong.

"'the force of law.' In my opinion, it would be neither "reasonable nor feasible to construe the section in any other "sense."

This decision was regarded by both of the tribunals in India who dealt with the present case as settling the law in the sense that Chinese customary law must in Burma govern the succession to a Chinese Buddhist. Had there in fact been a settled course of judicial decision in Burma upon the question, their Lordships would have been loath to disturb it. But from their review of the decisions it is abundantly clear that the important question now before the Board cannot be answered upon the mere principle of stare decisis. At the highest it may be said that there is a substantial preponderance of opinion against applying Burmese Buddhist law to the case of a Chinaman who is a Buddhist. As to the consequences of this opinion—the choice between Chinese customary law and the principles of English law or the Indian Succession Act—the decisions are not settled but conflicting. The matter must now be determined upon the words of s. 13 as a question of construction.

Their Lordships are in agreement with Page C.J. that a Chinaman who is a Buddhist comes within the term "Buddhists" in cl. (*a*) of sub-s. 1 of s. 13, and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or because the law which governs him in China is not a specifically Buddhist or even a religious law. The same is true of the word "Buddhist" in the Indian Succession Act, 1865, and in the present Act of 1925. It follows from this view, as the learned Chief Justice noticed, that sub-s. 1 must be applied to such a case as the present. There would be little difficulty, were it shown that different schools of Buddhist law obtained in different places or among different peoples, in applying to Buddhist law the principle that in each case the appropriate school of law is that to which the propositus or the persons concerned owned allegiance. As regards Hindu law, indeed, this principle has never been in doubt. Ample authority for it is to be found in decisions of the Board—as regards Mahomedan law, in *Rajah Deedar*

J. C.
1939
TAN MA SHWE ZIN
v.
KHOO SOO CHONG.

Hossein v. *Ranee Zuhoor-oon Nissa* (1); as regards Hindu law, in *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (2); *Soorendronath Roy* v. *Heeramonee Burmoneah* (3); *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (4); and *Balwant Rao* v. *Baji Rao*. (5)

But this principle does not justify the Court in applying as Buddhist law a law which is not Buddhist at all, merely because it is applied generally in China to Chinamen without any special exception for Buddhists. The law which is described in the statute as "the Buddhist law" is, like the Hindu and Mahomedan law, intended to be applied by the Court as a law known to the Court, and administered by the Court of its own skill and competence. If the phrase lex fori be used in this sense, the Buddhist law, as Sir John Jardine observed in *Hong Ku's* case (6), becomes under the Act one of several leges fori. It cannot be confounded or identified with a foreign law which has to be proved as matter of fact in each case by the appropriate evidence. It is doubtless true of the provisions made for Buddhists, Hindus and Mahomedans by the sub-section, as it was of the parallel provisions for Hindus and Mahomedans previously in force in Bengal, that the general intention of the Legislature is that persons coming within these classes should be governed by their own law. That is the intention which has always been attributed to Regulation IV. of 1793, and to the Civil Courts Acts which took its place. It was never, perhaps, better stated than by Sir William Jones advocating the passing of such a Regulation: "Nothing could be more "obviously just than to determine private contests according "to those laws, which the parties themselves had ever con- "sidered as the rules of their conduct and engagements in "civil life: nor could anything be wiser than, by a legislative "Act, to assure the Hindu and Mussulman subjects of Great "Britain, that the private laws which they severally hold "sacred, and violation of which they would have thought

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(1) (1841) 2 Moo. I. A. 441.
(2) (1839) 2 Moo. I. A. 132.
(3) (1868) 12 Moo. I. A. 81.
(4) (1902) I. L. R. 29 C. 433.
(5) (1920) I. L. R. 48 C. 30.
(6) L. B. Selected Judgments, 143.

"the most grievous oppression, should not be suppressed by "a new system, of which they could have no knowledge, and "which they must have considered as imposed on them by "a spirit of rigour and intolerance." [Lord Teignmouth's Life of Jones, p. 106.]

And in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1) this Board said (2): "They can conceive nothing more "likely to give just alarm to the Mahomedan community than "to learn by a judicial decision, that their law, the application "of which has been thus secured to them, is to be over-ridden "upon a question which so materially concerns their domestic "relations."

The same principle is at the root of the decisions, already referred to, applying to Hindus and Mahomedans the school of law applicable to their particular family or sect. Baron Parke, in a Hindu case, based this construction of s. 15 of Regulation IV. of 1793 on the consideration that "the law of "succession of the *Hindoos* partakes greatly of their religious "opinions, and is part of their system"; *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (3); and in a Mahomedan case he said: "Such is the natural construction of this Regulation, "and it accords with the just and equitable principle upon "which it was founded, and gives effect to the usages of each "religion, which it was evidently its object to preserve un-"changed." [*Rajah Deedar Hossein* v. *Ranee Zuhoor-oon-Nissa*. (4)] The principle was most succinctly stated by Sir Erskine Perry C.J. in the well known *Cutchi Memon* case (5) with reference to similar provisions in the statute establishing a Supreme Court at Bombay and Madras (37 Geo. 3, c. 142, s. 13) as "the "principle of uti possidetis." (6)

But, while the policy or general purpose of the Legislature in prescribing "the Buddhist law in cases where the parties "are Buddhists" is not in doubt, and has full effect upon the general population of Burma, it is not open to the Courts to adopt some other law for particular classes of Buddhists

(1) (1867) 11 Moo. I. A. 551.
(2) Ibid. 614.
(3) (1839) 2 Moo. I. A. 132, 167.
(4) (1841) 2 Moo. I. A. 441, 477.
(5) (1847) Perry's Oriental Cases, 110.
(6) Ibid. 124.

J. C.
1939
TAN MA SHWE ZIN v. KHOO SOO CHONG.

by reason that the prescribed method will not in such cases attain the desired result. The statute has made such exceptions to the enforcement of Buddhist law as were considered necessary, including a highly important saving as to custom, and it does not admit of being interpreted in such a sense that Buddhist law is only to be applied to Buddhists if it be the law prevailing in the country of their origin. The historical considerations to which their Lordships have alluded do not suggest that the intention of the sub-section is to prescribe for each Buddhist whatever law is found to govern him, but rather that all Buddhists shall be governed by a religious law which is deemed to be theirs as Buddhists. This assumption may be in some respects ill-founded. The influx of Chinese into Burma may not have been anticipated, or the relation between religion and law in China may have been imperfectly understood in 1872, when the rule now contained in the statute of 1898 was first introduced, or in 1865 when Buddhists were excepted from certain provisions of the Indian Succession Act. There may be difficulty and inconvenience in applying to Chinese Buddhists a law which is different from that which is applicable to them in China. It may, therefore, be that there is something here for reconsideration by the Legislature. But it is a problem de lege ferenda, and is not to be solved by interpreting the section in a sense of which it does not admit. Nor is a true construction of the section advanced by entertaining doubt whether the Buddhist law as it obtains in Burma really deserves so to be described in view of its Indian origin and of the indirectness of the influence of Buddhism thereon.

Some assistance is to be derived from the view taken by the Board in *Abraham* v. *Abraham* (1), which was distinguished in *Jowala Buksh* v. *Dharum Singh*. (2) In the former case, before the Indian Succession Act of 1865, a Hindu family converted to Christianity had no law of inheritance imposed on them by statute, and as a matter of equity and good conscience its members were held to be governed by the law and usages which they had either retained or adopted. But

(1) (1863) 9 Moo. I. A. 195. (2) (1866) 10 Moo. I. A. 511.

J. C
1939
TAN MA SHWE ZIN
v.
KHOO SOO CHONG.

it was held in the later case that this reasoning did not apply to a Hindu family which had embraced Islam, because (1) "the written law of India has prescribed broadly that in "questions of succession and inheritance the Hindoo law is "to be applied to Hindoos, and the Mahomedan law to the "Mahomedans." Hence Hindu law could not be applied to them save on proof of special usage controlling the Mahomedan law, which was not in that case forthcoming.

Their Lordships find themselves in agreement with the view which was taken by the Judicial Commissioner, Mr. Burgess, in the case of a Buddhist native of Chittagong who had settled in Burma, that "prima facie, as a Buddhist, "deceased would come under the Buddhist Law of the country "at large, and the burthen of proving any special custom "or usage varying the ordinary Buddhist rules of inheritance "would be on the person asserting the variance": *Ma Tin* v. *Doop Raj Barna.* (2) In *Fone Lan's* case (3) Sir Charles Fox cited these words and added (4): "If by the words "'country at large' be meant 'the province of Burma,' I venture "to doubt the proposition"; but their Lordships think that the proposition is well founded. As a question of construction this view is greatly to be preferred to the view that there is really no such law as Buddhist law but only Burmese Buddhist law; and the consequences which it entails are not less reasonable or convenient than are arrived at by applying to a Chinese Buddhist in the name of justice, equity and good conscience, those English principles of succession from which the Indian Succession Act exempted Buddhists.

To what extent, and on what conditions, the provision as to custom may enable a Chinaman who is a Buddhist to retain the usages of his country of origin as regards matters mentioned in the sub-section are questions of considerable moment upon this construction of sub-s. 1. As observed by Sir Lawrence Jenkins, delivering the judgment of the Board in a case under the very similar provision of s. 16 of the

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(1) (1866) 10 Moo. I. A. 537.

(2) Chan-Toon L. C. on Buddhist Law, vol. i., 370, 372.

(3) (1903) 2 L. B. R. 95.

(4) Ibid. 97.

J. C.
1939
Tan Ma Shwe Zin v. Khoo Soo Chong.

Madras Civil Courts Act (III. of 1873): "In India, however, "custom plays a large part in modifying the ordinary law": *Muhammad Ibrahim Rowther* v. *Shaik Ibrahim Rowther*. (1) The importance of kulachar or family custom in the case of Hindus has given rise to a line of decisions by British Indian Courts applicable to migrating families. Some of these have already been mentioned in this judgment, and *Mailathi Anni* v. *Subbaraya Mudaliar* (2) may be added as an instance of migration from without into British India. There are, moreover, cases of Hindu converts to Islam, where it has been held that Hindu law "had been engrafted as a custom on the "Mahomedan law": per Lord Dunedin in *Khatubai* v. *Mahomed Haji Abu* (3); and the effect of migration as to these was considered by the Board in *Abdurahim Haji Ismail Mithu* v. *Halimabai*. (4) Such matters require special consideration of the individual facts of each case, as well as of the nature and character of the laws or usages of the country of origin. The tenacity of customs of succession even under the strain of migration has been repeatedly recognized. "An adherence "to family usages is a strong Oriental habit; it is in most "places not a weak one": per Sir James Colvile in *Soorendronath Roy's* case. (5)

In the present case it is not in dispute that the propositus, Khoo Boon Tin, and his wife, Tan Ma Thin, were Chinese Buddhists, and that, unless the plaintiff can show that the law applicable in Burma to them in questions of succession is Chinese customary law, his suit cannot succeed. Their Lordships are of opinion that the Burmese Buddhist law is the law applicable to them, and it is not contended that according to that law the plaintiff has any claim to be the heir of either.

Their Lordships are further of opinion that on the evidence adduced in the present case it is not proved that according to Chinese customary law the plaintiff as nephew would be entitled, although not in fact adopted, to succeed as heir of Khoo Boon Tin in preference to the widow. No reliable

(1) (1922) I. L. R. 45 M. 308, 314.
(2) (1901) I. L. R. 24 M. 650.
(3) (1922) L. R. 50 I. A. 108, 112.
(4) (1915) L. R. 43 I. A. 35, 41.
(5) (1868) 12 Moo. I. A. 81, 96.

J. C.
1939
TAN MA SHWE ZIN
v.
KHOO SOO CHONG.

expert witness was called to speak to this question, and, though the book relied on by the Division Bench may have been admissible under s. 60 of the Indian Evidence Act, the conclusion drawn from its contents is drawn precariously, and from material both obscure and inadequate. The order of succession which is essential to the plaintiff's case is not established by the evidence either as matter of foreign law or as a custom, and his suit must fail.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the Division Bench be set aside, and that the decree of the trial judge, including his direction as to costs, be restored. The plaintiff will pay the appellants' costs of the appeal to the Division Bench and of this appeal.

Solicitors for the appellants: *Lambert & White.*

Solicitors for the respondent Khoo Soo Chong: *Gard, Lyell & Co.*

[HOUSE OF LORDS.]

H. L. (E.)* MOSS' EMPIRES, LIMITED . . . . APPELLANTS;

1939

April 25, 27;
June 29.

AND

OLYMPIA (LIVERPOOL), LIMITED, AND ANOTHER . . . . RESPONDENTS.

Landlord and tenant—Lease—Covenant to expend specific sum each year on repairs—Breach—Whether debt or damages—Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

A lease, of which the respondents were assignees, contained a covenant by them " to expend during each year of the said term " on . . . . repairs and decoration a sum of five hundred pounds " and at the end of each year of the said term to produce to " the lessors evidence of such expenditure or to pay to them at " the end of each such year a sum equal to the difference between " the amount so expended and five hundred pounds . . . ." :—

Held, that the obligation created a debt, and was not a covenant to pay damages for breach of covenant to repair within s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, the stipulated sum being payable whether or not there was a breach of covenant.

Decision of the Court of Appeal reversed.

APPEAL from a decision of the Court of Appeal.

The appellants, the plaintiffs in the action, sued the defendants, claiming the sum of 1078*l.* 8*s.* payable under, or as damages for the breach of covenants contained in, a lease dated October 16, 1924, for twenty-four years from March 22, 1925, of the Olympia Theatre (Liverpool), which had been assigned to the respondents, the defendants in the action, and against the defendant Abrahams for the same amount for the non-performance of a guarantee contained in the lease and in a licence to grant the said assignment dated July 1, 1925.

By the lease of October 16, 1924, the lessees covenanted for themselves and their permitted assigns to keep the demised premises both externally and internally in good and substantial repair, condition and decoration, to do certain painting, and by clause 2 (vii.) " to expend during each year

* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD PORTER.

"of the said term on such repairs and decoration a sum of "500*l.* and at the end of each year of the said term to produce "to the lessors evidence of such expenditure or to pay to "them at the end of each such year a sum equal to the "difference between the amount so expended and 500*l.* "provided that the whole of the said sum shall not be expended "on decorations alone but a proper proportion thereof shall "be expended on necessary repairs to the structure of the "said premises such proportion to be determined by the "surveyor of the lessors provided nevertheless that the "expenditure and payment by the lessees of such sum of "500*l.* per annum shall be accepted by the lessors as full "satisfaction of the covenants iv., v., and viii. so that if in "any one year a larger sum than 500*l.* shall with the consent "in writing of the lessors be expended by the lessees for the "like purpose the amount of such expenditure in excess of "500*l.* shall be taken in or towards satisfaction of the lessees' "future liability under this sub-lease."

By an indenture dated September 3, 1925, the premises were assigned to the respondents, Olympia (Liverpool), Ld., who covenanted and agreed with the appellants that they would at all times thereafter observe and perform all the covenants and conditions in the lease.

The appellants alleged that while the said term was vested in the respondents they failed in the performance of the covenants to expend during each year on such repairs and decorations the sum of 500*l.*, and failed at the end of each year to produce to the appellants evidence of such expenditure, and further failed to pay to the appellants at the end of each year a sum equal to the difference between the amount so expended and 500*l.*, the amount unspent by the appellants being they said 1078*l.* 8*s.*, which sum they now claimed.

The respondents by their defence denied that they were under any obligation to expend the sum of 500*l.* during each of the years in question, and they further denied that they committed any breach of the covenants in the lease. If (which was denied) the respondents had committed any breach of the covenants, they contended that by virtue of the Landlord and Tenant Act, 1927 (1), the amount recoverable by the appellants was limited to the amount by which the value of the reversion was diminished owing to such breach. They further pleaded that the sums of money expressed to be payable in the event of the lessees not expending during each year a sum of 500*l.* were in the nature of penalties, and as such were irrecoverable. In the alternative they contended that the covenant in the lease for the expenditure of 500*l.* did not run with the demised premises, and accordingly was not binding on the respondents.

Hilbery J. gave judgment for the present appellants, holding that the action was not one to be looked upon as an action for damages for breach of covenant, but as an action for the amount due on the covenant which there had been a failure to pay, that being quite a distinct thing from an action for damages for breach of the covenant. As in the last year, however, 500*l.* was in fact expended by the present respondents, and in this way the amount of the claim was reduced, the judge gave judgment in favour of the present appellants for the amount so reduced—namely, 737*l.* 8*s.* 10*d.*

On appeal, the Court of Appeal (Greer, Slesser and MacKinnon L.JJ., Greer L.J. dissenting) reversed the decision of Hilbery J., holding that the case could only be formulated as one for damages for breach of covenant to repair, and as such was defeated in limine by s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927.

Moss' Empires, Ld., appealed to this House.

Cyril Radcliffe K.C. and *P. B. Morle* for the appellants. The action is not based on any allegation of failure to repair the premises, but on the allegation that the respondents undertook to pay a specified sum of money in a certain event, which they did not pay on the event happening. While the general rule with regard to the measure of damages for a breach of covenant by the lessee to deliver up the demised premises in repair is that such damages are the cost of putting the premises into the state of repair required by the covenant: *Joyner* v. *Weeks* (1), there is no need in this case to estimate the damages, the sum to be paid by the lessees being specifically agreed. [They also cited *Conquest* v. *Ebbetts*. (2)]

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(1) Landlord and Tenant Act, 1927, s. 18, sub-s. 1: "Damages "for a breach of a covenant or "agreement to keep or put premises in repair during the "currency of a lease, or to leave "or put premises in repair at the "termination of a lease, whether "such covenant or agreement is "expressed or implied, and "whether general or specific, shall "in no case exceed the amount "(if any) by which the value of "the reversion (whether immediate or not) in the premises is "diminished owing to the breach "of such covenant or agreement "as aforesaid. . . . ."

Charles Harman K.C., J. V. Nesbitt and *Hon. B. L. Bathurst* for the respondents. This in fact is an action for breach of covenant to repair and is consequently not maintainable by reason of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927. It is an essential part of the appellants' case to show that the respondents have failed to apply 500*l.* on repairs. A covenant to expend 500*l.* on property is a covenant to repair. What is broken, or is said to be broken, is a covenant to repair if the sum of 500*l.* is not paid. Placed in the lease where it is, it is an integral part of the covenant, and, if the 500*l.* is not paid, the appellants' only right would be to sue for the breach of the covenant, and that is in terms struck at by the Act of 1927.

[LORD ATKIN. If repairs are effected by a payment of say 300*l.*, the balance of the 500*l.*, namely 200*l.*, can be put by the lessors to meet eventual liability for repairs. There would appear to be nothing wrong in that.]

We submit that if repairs are carried out by an expenditure of say 300*l.*, the obligation of the covenant has been fully performed. A covenant such as this is properly regarded as a penalty: see *Lord Howard de Walden* v. *Barber* (3); *Bradshaw* v. *Lemon*. (4) If a covenant runs with the land, it is affected by the Act of 1927.

Cyril Radcliffe K.C. in reply. This action is not a claim for damages for breach of a repairing covenant, but is a claim for the payment of money which was contracted to be paid on a contingency that has happened.

(1) [1891] 2 Q. B. 31.
(2) [1896] A. C. 490.
(3) (1903) 19 Times L. R. 183.
(4) [1929] N. I. 159.

H. L. (E.)

1939

Moss' Empires, Ld. v. Olympia (Liverpool), Ld.

The House took time for consideration.

Lord Atkin. My Lords, this is an appeal from a decision of the Court of Appeal, Slesser and MacKinnon L.JJ., who (Greer L.J. dissenting) reversed the judgment of Hilbery J. in favour of the plaintiffs, the present appellants. The action was brought to recover money said to be due under the covenants of a lease: and it is necessary to refer to the relevant documents. By a lease dated October 16, 1924, the appellants demised to A. E. Abrahams, Ld., the lessees, the premises known as the Olympia Theatre, Ld., together with certain fixtures and effects for a term of twenty-four years from March 22, 1925, determinable at the expiration of the 3rd, 7th, 14th or 21st year of the term, at the rents therein mentioned, and in consideration of the covenants therein contained, reference to which must be made later. Mr. Abraham Emanuel Abrahams, the second respondent, was a party to the lease as a guarantor. He guaranteed that the lessees would perform all the covenants on the part of the lessees. By a supplemental indenture dated December 17, 1934, between the same parties, a further covenant by the lessors was given, which was recited to have been omitted by inadvertence from the original lease, that, subject to the conditions there mentioned, the lessors would on notice effect any necessary structural repairs to the premises. On July 1, 1925, by an indenture made between the same parties, the lessors granted to the lessees licence to assign the lease to Olympia (Liverpool), Ld., and Mr. A. E. Abrahams guaranteed that the licensees should perform all the covenants and conditions by them to be performed.

Accordingly, by indenture dated September 3, 1925, and made between the original lessees, Mr. A. E. Abrahams and Olympia (Liverpool), Ld., the original lessees duly assigned the lease to Olympia (Liverpool), Ld.: and Mr. Abrahams as guarantor under the original lease concurred in the assignment. Thereupon Olympia (Liverpool), Ld., held under the assignment until in the course of these proceedings they terminated the lease at the expiration of the 14th year of the term. To explain the issues between the parties, it will be necessary to set out the following covenants in the original lease, the lessees' covenants with the lessors. [His Lordship read these and continued :] The claim in this action by the lessors is based on covenant 2 (vii.). Up to the end of the year ending March 22, 1928, no question had arisen. For the four years from March, 1928, to March, 1932, there was a surplus over the 500*l.* a year mentioned in clause vii. of 202*l.*, resulting in a credit to the lessees of that amount under the second proviso in clause vii. For the three years ending 1933, 1934 and 1935, the defendants expended in each year less than 500*l.*, leaving a balance in favour of the plaintiffs of 942*l.* 16*s.* 9*d.*, which after deducting the credit of 205*l.* 7*s.* 11*d.*, leaves a final balance of 737*l.* 8*s.* 10*d.* for which the judge gave judgment. The details will be found in his judgment and need not be restated. The defences raised are as follows :—

1. The defendants say that to allow the plaintiffs to recover this sum is to violate the provisions of the Landlord and Tenant Act, 1927, s. 18, sub-s. 1, which provides "Damages "for a breach of a covenant or agreement to keep or put "premises in repair during the currency of a lease, or to leave "or put premises in repair at the termination of a lease, "whether such covenant or agreement is expressed or implied, "and whether general or specific, shall in no case exceed the "amount (if any) by which the value of the reversion (whether "immediate or not) in the premises is diminished owing to the "breach of such covenant or agreement as aforesaid." The amount claimed is, they say, damages for breach of covenants to keep in repair, and no diminution in the value of the reversion was or could be proved.

2. If this sum is not recovered as damages for breach of covenants to repair, the covenant to pay the sum claimed was a bare covenant to pay money not touching the thing demised, did not therefore run with the land, and did not bind the assignees.

3. If this was a covenant to pay money, it was to pay money by way of penalty and no damages are proved.

4. Before the 500*l.* became due to be spent each year, the

proportion to be expended on repairs to the structure had to be determined by the lessors' surveyor. This was a condition precedent to liability and had not been performed.

5. The guarantor was only sued in respect of the default of the assignees, and, if the covenant did not run with the land, he escaped liability in this action.

The Court of Appeal decided in favour of the defendants on the ground that they were protected by the terms of the Landlord and Tenant Act, 1927. My Lords, I think that the answer is that the defendants are not being sued for damages for breach of covenant to repair. They are being sued in debt on covenant to pay a fixed sum of money. The covenants must no doubt be read together. So read they form part of a carefully devised and co-ordinated arrangement by which in substance the liability of the tenant for repairs during the term is limited to 500*l.* a year: which sum he has to pay whether repairs are necessary or not.

There were years during the term in which the covenants to paint, (v.) and (vi.), would not be operative at all. In any year the general covenant to keep in repair might not require the expenditure of 500*l.* Clause (vii.) therefore could not be construed to impose an obligation to spend 500*l.* on repairs and decoration in the performance of the covenants to repair where the covenants to repair did not themselves require the expenditure of such a sum. In other words the covenant in (vii.) must be construed as a covenant to spend during each year up to 500*l.* in the performance of the repairing covenants. The balance of 500*l.* nevertheless had to be paid to the lessors and quite plainly, therefore, as it seems to me, that balance is not payable as "damages for breach of a "covenant to repair" within the meaning of the Landlord and Tenant Act, 1927. One may suppose three possible conditions in any given year:—

1. No repairs at all required by the repairing covenants to be executed on the premises.

2. 300*l.* only required by the repairing covenants to be expended on repairs and duly expended.

3. 700*l.* required by the covenants to be expended on repairs and nothing expended.

In conditions 1 and 2, neither 500*l.* nor 200*l.* have any relation to damages for non-repair. In the last case there would be a breach of the repairing covenant, but 500*l.* would be payable, not as damages for breach of the covenants, but as a sum agreed to be paid as a means of satisfying the obligation to repair.

I think, therefore, that the sums claimed in this action are not damages but debt. The amount to be paid is not determined by the amount of damages for breach of repairing covenants, but by the amount in fact expended in performing the repairing covenants. The Landlord and Tenant Act, 1927, has no application. And if it does not apply in its ordinary and natural construction, I do not understand how there can be said to exist any principle of law which would avoid an agreement not in terms avoided by the statute sought to be applied. The defence of the statute fails.

2. On the other hand, this is not a bare obligation to pay money which does not touch the thing demised. On the contrary, the performance of the repairing covenants and the obligations under clause vii. are so inextricably bound together that it would be impossible to sever clause vii., and treat it as a collateral promise to pay money. The relevant clauses read as a whole provide a scheme whereby if things work smoothly the obligation of the tenant over the term is limited to 500*l.* a year, less than one-sixth of the total rent, while the lessor is provided with sums which, if he chooses, he may apply towards meeting the obligation which he has assumed of performing structural repairs. In my opinion the clause in question closely touches the thing demised, and runs with the land.

3. The exposition of the clauses given above disposes of the contention that this was a penalty. The sum is payable whether there are breaches or not of the covenants, and is not intended as a substitute for damages.

4. The contention that the determination of the lessors' surveyor as to the amount to be spent on structural repairs is a

H. L. (E.)

1939

Moss' Empires, Ld. v. Olympia (Liverpool), Ld.

Lord Atkin.

condition precedent to the payment of 500*l.* cannot in my opinion be supported. It would give the covenant a construction which it would be quite impracticable to fulfil in the ordinary conduct of the lessees' business: and is quite inconsistent with the view expressed above that the 500*l.* may be due though nothing needed to be expended under any obligation to repair.

5. As the assignees are held liable for payment, this defence does not arise, and the guarantor is liable under his guarantee of performance by the assignees.

For these reasons, which merely restate the reasons given by Hilbery J. and Greer L.J., I think that the appeal should be allowed with costs here and in the Court below, and that the judgment of Hilbery J. in favour of the plaintiffs should be restored.

My Lords, I am asked by my noble and learned friend Lord Thankerton to say that he agrees with the opinion which I have just read.

LORD MACMILLAN. My Lords, it certainly cannot be said that the covenants contained in the lease of October 16, 1924, and the relative supplementary deed of December 17, 1924, with which this appeal is concerned, were entered into with any idea of defeating or evading s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, for they antedate the statute by three years. But they may nevertheless be affected by this supervenient legislation, if it applies to them.

When a statute purports to interfere with subsisting contracts, it is, in my opinion, incumbent on the party who claims that it has released him from his obligations to show clearly that it covers his case. In the present instance, in order to secure the benefit of the statute, the respondents have to satisfy your Lordships that the appellants are seeking in these proceedings to recover " damages for a breach of a covenant " or agreement to keep or put premises in repair during the " currency of a lease."

Your Lordships will hear from my noble and learned friend Lord Porter a detailed analysis of the covenants in question which I have had the advantage of reading in advance and with which I agree. In view of that analysis the present action cannot, in my opinion, properly be characterized as an action of damages for breach of a covenant to repair. It is difficult to see how the action could be so characterized, inasmuch as it would be no defence to it to aver and prove that at the date of the summons the premises were in perfect repair. The contract in suit was entered into between business people, obviously competently advised, and so far from being within the mischief of the Act, appears to me to embody a sensible and convenient arrangement for obviating all questions about the repair of the premises let.

If the covenants are not, as in my opinion they are not, covenants to keep or put premises in repair within the meaning of the statute of 1927, then there is nothing to prevent the appellants from enforcing them according to their terms and, as I agree with your Lordships that by their nature they run with the land, they are enforceable against the respondent company as assigns of the lease and also against the individual respondent as guarantor. The appeal should in my opinion be allowed and the judgment of Hilbery J. should be restored.

LORD WRIGHT. My Lords, I agree with the opinions which have been delivered by my noble and learned friends Lord Atkin and Lord Macmillan. I also agree with the opinion of my noble and learned friend Lord Porter which he has asked me to read on his behalf.

LORD PORTER (read by LORD WRIGHT). My Lords, by a lease dated October 16, 1924, and made between the appellants, A. E. Abrahams, Ld. (the lessees), and A. E. Abrahams (the guarantor), the appellants demised to the lessees the premises known as the Olympia Theatre of Liverpool for a period of twenty-four years (subject to certain rights of earlier determination) from March 22, 1925, at the yearly rent specified. The lease included certain articles or effects required for the purpose of carrying on performances, and contained a number of covenants for repair and decoration.

Those covenants may be described as (i.) a general covenant for repair, clause 2 (iv.); (ii.) a covenant for outside painting, clause 2 (v.); (iii.) a covenant for inside painting and decoration, clause 2 (vi.); (iv.) a covenant to repair and if necessary to replace the effects, clause 2 (viii.).

Clause 2 (vii.), upon which the decision of the case largely turns, must be set out in full. It is as follows: "In the "performance of the covenants in sub-clauses iv., v., vi. and "viii. herein contained to expend during each year of the "said term on such repairs and decoration a sum of five "hundred pounds and at the end of each year of the said "term to produce to the lessors evidence of such expenditure "or to pay to them at the end of each such year a sum equal "to the difference between the amount so expended and five "hundred pounds Provided that the whole of the said sum "shall not be expended on decorations alone but a proper "proportion thereof shall be expended on necessary repairs "to the structure of the said premises such proportion to be "determined by the surveyor of the lessors Provided never-"theless that the expenditure and payment by the lessees "of such sum of five hundred pounds per annum shall be "accepted by the lessors as full satisfaction of the covenants "iv., v., vi. and viii. so that if in any one year a larger sum "than five hundred pounds shall with the consent in writing "of the lessors be expended by the lessees for the like purpose "the amount of such expenditure in excess of five hundred "pounds shall be taken in or towards satisfaction of the "lessees future liability under this sub-clause."

Clause 2 (xxi.) contained the covenant to yield up the premises and effects in good repair, and continued: "but so "that this provision shall as regards the demised premises "and the said effects be deemed by the lessors to have been "satisfied by the expenditure at the rate of five hundred "pounds per annum as hereinbefore provided."

It appears that when the deed was drafted or engrossed one of the terms agreed upon was omitted by mistake. As a result a supplemental agreement of December 17, 1924, was entered into between the same parties providing as follows:

". . . . subject to the expenditure by the lessees provided "by the principal indenture the lessors will at their own "expense in any year in which the lessees shall have expended "not less than the sum of five hundred pounds referred to "in the principal indenture upon notice of any defects being "given to the lessors by the lessees effect any structural or "other repairs which may be necessary for the proper main- "tenance and support of the demised premises."

By an indenture of July 1, 1925, the appellants granted the lessees liberty to assign the premises and effects to Olympia (Liverpool), Ld., the first respondents. The guarantor was also a party to this agreement and guaranteed the payment of the rent and performance of the covenants in the lease by the assigns as he had previously guaranteed the payment and performance by the original lessees.

In pursuance of the permission so granted, A. E. Abrahams, Ld., with the concurrence of A. E. Abrahams did, by indenture of September 3, 1925, assign the lease of the premises and effects to the first respondents.

The first respondents went into possession of the premises and admittedly paid all the rent due.

It is accepted by the appellants that at first the assignees also substantially performed the covenants of the lease. Indeed it is conceded that at March 22, 1933, the first respondents were entitled under clause 2 (vii.) to a credit of 205*l.* 7*s.* 11*d.* because they had in previous years expended with the consent in writing of the lessors sums exceeding 500*l.*

The appellants asserted that in each year after that date the first respondents had broken the covenants of the lease by failing to pay the difference between what they had spent on the premises and 500*l.* The duty of the first respondents was, they said, either to spend 500*l.* on repairs in each year and produce evidence that they had done so, or if so much was not required in any year, or if they did not expend so much, whether required or not, to pay the difference between what they did spend and 500*l.* The respondents denied that this was the true construction of the lease or its legal effect.

The appellants thereupon issued a writ dated January 26, 1937, claiming 1078*l.* 8*s.* against the first respondents for their failure to perform the covenants of the lease and against the second respondent under his guarantee. This sum was arrived at by adding together the amounts by which the first respondents' expenditure on the premises was alleged to have fallen short of 500*l.* in each of the years ending March 22, 1933–4–5–6.

At the trial the learned judge, by his judgment delivered on January 25, 1938, found the first respondents liable under the covenants of the lease and the second respondent liable under his guarantee, but he did not accept the figures put forward. He found that the respondents were entitled to a credit of 205*l.* 7*s.* 11*d.* on March 22, 1933; he found also that the first respondents had failed to spend and prove that they had spent more than 268*l.* 1*s.* for 1932–3, 168*l.* 2*s.* 3*d.* for 1933–4 and 121*l.* for 1934–5. The full sum at least had been spent in 1935–6. These figures left a total shortage, after allowing for the credit of 205*l.* 7*s.* 11*d.*, of 737*l.* 8*s.* 10*d.*, a sum for which the learned judge gave judgment against both respondents.

From this judgment the respondents appealed to the Court of Appeal, who, by a majority, allowed the appeal and ordered judgment to be entered for the respondents.

In both Courts the main contest turned upon the question whether the respondents were protected from liability under s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, which runs as follows:—

" 18.—(1.) Damages for a breach of a covenant or agreement " to keep or put premises in repair during the currency of a " lease, or to leave or put premises in repair at the termination " of a lease, whether such covenant or agreement is expressed " or implied, and whether general or specific, shall in no case " exceed the amount (if any) by which the value of the " reversion (whether immediate or not) in the premises is " diminished owing to the breach of such covenant or agree" ment as aforesaid; and in particular no damage shall be " recovered for a breach of any such covenant or agreement " to leave or put premises in repair at the termination of a " lease, if it is shown that the premises, in whatever state of "repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such "structural alterations made therein as would render valueless "the repairs covered by the covenant or agreement."

Each party relied upon the terms of clause 2 (vii.) of the lease, the respondents affirming and the appellants denying that failure to comply with that sub-clause was a breach of a covenant to repair. It was common ground that, if the section applied, the appellants had given no evidence from which the amount by which the value of the reversion had diminished could be ascertained, and therefore they could recover nothing in the present action.

It follows that it is essential to determine in the first place the exact meaning of that sub-clause.

The respondents construed it as imposing an obligation to spend 500*l.* on repairs in each year. If that sum was not spent on repairs whether those repairs were required or not there was, they said, a breach of covenant to repair. The damage thereby caused was no doubt quantified and limited to the difference between 500*l.* and the sum actually spent, but it still remained damages for breach of a covenant to repair. I do not so read the covenant. To do so is, I think, to neglect the opening words: "In the performance of the covenants in sub-clauses "iv., v., vi. and viii." and to give no effect to the words "or to pay . . . . a sum equal to the difference between the "amount so expended and five hundred pounds." The obligation is to expend on such repairs the sum of 500*l.* or pay the required difference, and *such* repairs must mean the repairs and decoration necessary to perform the covenants contained in sub-clauses iv., v., vi. and viii. If that sum is not required for those purposes, the contract cannot be fulfilled if it is to be construed as the respondents contend. But, if the appellants' construction be accepted, it will be fulfilled by spending what is required on the necessary repairs and paying in addition a sum sufficient to make up 500*l.* in all.

I should read the sub-clause as meaning: "The lessees shall "spend 500*l.* each year on repairs so far as the covenants to

H. L. (E.)
1939
Moss' Empires, Ld. v. Olympia (Liverpool), Ld.
Lord Porter.

"repair require it. If, however, so much is not required or "if the lessees do not in fact spend and prove they have "spent so much, then they may fulfil their obligation by "paying a sum which with what they have spent will amount "to 500*l*."

They have not in my view broken their contract by failing to spend 500*l*. They are given what I think is a true alternative, a right to fulfil their contract by spending 500*l*. or by spending a less sum and paying the difference between what they have spent and 500*l*. If they have spent nothing, that difference would be 500*l*.; if less than 500*l*., it would be the difference between the sum spent and 500*l*.

Not to pay that sum is not a breach of a covenant to repair but a failure to pay the amount by which the expenditure fell short of the stipulated sum.

It is not expenditure which is required alone. Expenditure and payment or even payment without expenditure are also a performance of the contract.

Such a construction is, I think, more consistent with the second proviso than that contended for by the respondents. Moreover, it does not compel the adoption of a construction which would impose upon the respondents an obligation either to spend 500*l*. on repairs whether required or not, or in default to be held guilty of breaking their contract by failing to do repairs which might not be required.

I do not think that non-compliance with clause 2 (vii.) is necessarily a breach of covenant to repair. No doubt an action could be framed upon that clause for such a breach, but if the claim be for failure to pay the difference between the sum expended and proved and 500*l*., in my view the claim is for a sum of money and not for breach of repairing covenants.

But the respondents, even if they are held to be wrong in the contention that they are freed from liability under s. 18 of the Act, maintain that the stipulation that they shall pay the sum by which their expenditure falls short of 500*l*. is a penalty and not a liquidated sum as damages. I doubt if it is either. It is, I think, a sum payable as an alternative to spending

500*l.* a year, not a penalty for failing to do so, or liquidated damages for that failure.

If it were not for the provisions of clause 2 (vii.), the lessees would be obliged to spend in each year any sum however large required to keep the premises in repair in accordance with the terms of clause 2 (iv.), (v.), (vi.) and (viii.). The amount might exceed 500*l.* a year and at any rate would be an unknown quantity. Clause 2 (vii.), whilst it imposes a minimum payment, also provides a limit beyond which the lessees shall not be liable. Moreover, so far as structural repairs at any rate are concerned, the supplemental agreement imposes upon the lessors the obligation to pay any excess beyond that which is required of the lessees.

It is true that by reason of the first proviso contained in clause 2 (vii.) the lessees have to expend what the lessors' surveyor considers a reasonable proportion of the sum to be provided by them in structural repairs, but even when that obligation is fulfilled a considerable expense may still fall upon the lessors.

Moreover by providing a yearly sum of 500*l.* the lessees not only escape further liability for current repairs, they also, under clause 2 (xxi.), avoid paying what might be a large sum in fulfilling their obligation to leave the premises in good repair.

The scheme seems to be to limit the lessees' liability to 500*l.* a year, unless in any one year they think it necessary to spend more than 500*l.* for the purposes of their business and cannot obtain the consent of the lessors to their doing so.

If these facts are borne in mind, the terms of clause 2 (vii.), as I think, lack every element which would constitute a penalty. They constitute a provision for the mutual advantage of lessors and lessees under which one or the other stand to gain according as more or less repairs are found to be required, and, so far as the lessees are concerned, they put a limit upon their obligations.

In the event of their failure to succeed upon the matters already considered, the respondents asserted that, being only assignees, they were not liable for non-payment of the sum claimed. The appellants were, they said, in a dilemma. Either the action was for breach of a covenant to repair which ran with the land, or for payment of a sum of money which did not run with the land but was merely collateral and bound only the original lessees.

I think your Lordships are all of opinion that this argument should not succeed.

In the first place the original lease provides that the term lessees "shall when the contract admits include permitted assigns," and though this is by no means determinative where the covenant is merely collateral, it is an element to be considered.

In the second place the covenants in the present case are not merely collateral. They directly touch and concern the thing demised and so come within the first rule in *Spencer's Case.* (1)

This is not a bare or mere covenant to pay 500*l.* or even to pay the difference between the sum spent and proved and 500*l.* It is part of a number of covenants whereby the mutual obligations of landlord and tenant in repairing and redecorating the premises are fulfilled and is inextricably bound up with them.

In my opinion it runs with the land. This view makes it unnecessary to determine whether, even if the obligations of the lessees did not pass to the assignees, the guarantor would still be liable upon his guarantee contained in the original lease, though he would escape liability under the licence to assign in which he guaranteed the assignees only, and was therefore under no liability in a case where the assignees were not liable, because the covenant on which they were sued did not run with the land.

The point is a pleading point and turns upon whether the word "guarantee" in para. 9 of the statement of claim refers to both guarantees or only to that contained in the licence to assign.

No question of principle is involved, and to discuss the question would be merely academic.

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(1) (1583) 5 Co. Rep. 16a.

H. L. (E.)

1939

MOSS' EMPIRES, LD. *v.* OLYMPIA (LIVERPOOL), LD.

I would allow the appeal and restore the judgment given by the learned judge in the Court of first instance.

Appeal allowed.

Solicitors for appellants : *Burton & Ramsden.*
Solicitors for respondents : *H. S. Wright & Webb.*

[HOUSE OF LORDS.]

H. L. (E.)* REARDON SMITH LINE, LIMITED . . APPELLANTS;

1939
May 1, 2, 4:
June 29.

AND

BLACK SEA AND BALTIC GENERAL INSURANCE COMPANY, LIMITED } RESPONDENTS.

Charterparty—Contract voyage—Bunkering at port off geographical route—Whether deviation.

It is the duty of a ship when sailing upon an ocean voyage from one port to another to take the usual route between those ports. If no evidence is given, that route is presumed to be the direct geographical route, but this may be modified for navigational or other reasons, and, unless a specific route is prescribed, evidence may be given to show what the usual route is. In some cases there may be more than one usual route, and the exigencies of bunkering may require the vessel to depart from the direct route or compel her to touch at ports at which, if she were proceeding under sail, it would be unnecessary for her to call. In every case evidence is admissible to show what is the usual or a usual route, and, if the evidence is sufficient to establish a practice to follow a particular route, proceeding by that route is not a deviation.

An oil-burning vessel was chartered to carry a cargo from Poti in the Black Sea to a port in the United States. After loading at Poti she proceeded to Constantza, which was not on the geographically direct route, for bunkers:—

Held, that the evidence showed that the practice of proceeding to Constantza to bunker after loading had become a usual commercial route, and therefore the fact that she went there was not a deviation which disentitled her owners from claiming a general average contribution in respect of her grounding off Constantza.

Leduc & Co. v. *Ward* (1888) 20 Q. B. D. 475; *Glynn* v. *Margetson & Co.* [1893] A. C. 351; *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1902) 18 Times L. R. 374; and *Frenkel* v. *MacAndrews & Co.* [1929] A. C. 545 discussed.

Decision of Court of Appeal [1938] 2 K. B. 730 reversed.

APPEAL from a decision of the Court of Appeal. (1)

The appellants, the plaintiffs in the action, sued the defendants claiming contribution to general average sacrifice and expenditure incurred by the appellants in consequence of the stranding of their steamship *Indian City* off the port of Constantza on the Roumanian coast of the Black Sea while on a voyage from Poti, an eastern Black Sea port, to North America, laden with a cargo of manganese ore, of which cargo the defendants were the insurers. The charterparty stated expressly that the *Indian City* would be burning oil. The liability of the respondents was alleged by the appellants to be founded upon an underwriters' guarantee signed by them in consideration of the appellants refraining from exercising their lien upon the cargo. It was not now disputed by the respondents that, if the cargo-owners at the time of the general average, namely, the charterers, were liable to contribute, the respondents were liable under the guarantee. The respondents contested their liability to pay any contribution on the ground that the *Indian City* had deviated from the chartered voyage in that, after loading her cargo at Poti she proceeded to Constantza to bunker instead of proceeding direct to the Sea of Marmora ; they said that having regard to the unambiguous description of the voyage in the charterparty and bill of lading it became the duty of the *Indian City* to proceed from Poti to Sparrow's Point, U.S.A., with all convenient speed and by the direct geographical route, and that no evidence was admissible to justify a departure from that direct geographical route unless such departure was rendered necessary by the operation of some excepted peril, which was not shown. The appellants relied on the fact that on a number of earlier voyages, their vessels, which were under charter to the same charterers as was the *Indian City*, had taken in fuel oil for the chartered voyages at Constantza, which entailed on each occasion a diversion from the direct geographical route between the loading port and the Sea of Marmora.

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(1) [1938] 2 K. B. 730.

* *Present:* LORD ATKIN, LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, and LORD PORTER.

The action was tried by Goddard J., who found that at the material time not only the appellants' ships, but oil-burners belonging to other owners, were in the habit of bunkering at Constantza, where a large supply of cheap oil fuel was available ;

that it had been proved to have become a regular practice by the autumn of 1933 for oil-burning ships leaving the Eastern ports to bunker at Constantza which was off the direct route to the Bosphorus; that, in determining what the described voyage was, evidence was admissible to show how far the exigencies of navigation and the usages of trade permitted or required elasticity in the route by which the ship was to reach her journey's end, the shortest sea track being not the only consideration; and that consequently in this case there had been no deviation. He accordingly gave judgment for the present appellants.

The Court of Appeal (Greer, Slesser and Clauson L.JJ., Greer L.J. dissenting) reversed the decision of Goddard J., holding that, in the absence of a proved trade custom in the strict sense, the words in the charterparty exactly defined the object and intention of the contract—namely, that the vessel should proceed on her voyage by the direct geographical track.

The plaintiffs appealed to this House.

A. T. Miller K.C. and *Cyril Miller* for the appellants. By the practice which had grown up Constantza was a port on the voyage defined by the charterparty, and in view of that practice the decisions in *Leduc & Co.* v. *Ward* (1) and *Glynn* v. *Margetson & Co.* (2) have no application to the present case. In the former of those cases goods were shipped at Fiume for delivery at Dunkirk. Instead of proceeding direct to Dunkirk the ship sailed for Glasgow, and was lost, with her cargo, off the mouth of the Clyde, by perils of the sea. It was held that evidence was not permissible to vary the terms of the bill of lading, which imported a voyage direct from Fiume to Dunkirk, subject to the liberty to call at any ports of call substantially within the course of such a voyage. Similarly in *Glynn's* case (2) there was a complete deviation from the chartered voyage—indeed in the opposite direction, which could in no way be justified. There was no similar deviation in the present case. In *Evans, Sons & Co.* v. *Cunard*

(1) (1888) 20 Q. B. D. 475. (2) [1893] A. C. 351.

Steamship Co. (1) Wills J. gave effect to the business sense of the charterparty, and rejected the contention that the generally described route necessarily meant the invariable route. In *Morrison & Co.* v. *Shaw, Savill & Albion Co.* (2), where the ship on a voyage from New Zealand for London, having "liberty on the way to London to call and stay at "any intermediate port or ports," called at Havre, it was held that Havre was not an "intermediate port" within the meaning of the bills of lading. But if in that case the Court had had evidence similar to that in the present case the result, we submit, would have been different. In *Frenkel* v. *MacAndrews & Co.* (3) Lord Buckmaster said (4) that "a "bill of lading, like every other contract, must be construed "in relation to the circumstances in which it was entered "into and the respondents say that in the present case those "circumstances include the practice of the sailings of their "vessels, which was well known to the appellant." There parol evidence was held admissible to show what the voyage was and that the route followed was a usual commercial route. That is what we say in the present case.

G. St. C. Pilcher K.C. and *Gordon Willmer K.C.* for the respondents. The evidence shows that oil-burning vessels went to Constantza because oil is cheaper there than at ports directly on the route, but this vessel might and should have gone to Constantza first for its supply of oil. Where the contract voyage is described as from A to B, prima facie that means that the vessel must follow the direct geographical route. That, it is submitted, is axiomatic. Further, on a voyage so described no evidence is admissible to vary or add to that unambiguous description, unless such evidence is directed to prove a strict custom, or unless there are two geographical tracks possible. It is said that a practice had been established for oil-burning vessels to go off the direct contractual route to bunker at Constantza, but the proportion of vessels which had done so is not sufficient to establish a commercial practice to which the Court will give effect. In

(1) (1902) 18 Times L. R. 374.
(2) [1916] 2 K. B. 783.
(3) [1929] A. C. 545.
(4) Ibid. 549.

Royal Exchange Shipping Co. v. *Dixon & Co.* (1) Lord Watson, dealing with a practice sought to be relied upon in that case, said (2): "Shippers who are aware of the existence of such "a practice, and do not object to it, cannot be said to have "consented to a modification of the contract embodied in "their bills of lading. Their non-intervention merely implies "that they do not think it necessary to prevent a deviation "from the contract, because they are satisfied of the ship-"owner's ability to make good all loss arising from his having "broken it." That is precisely in point in this case. The majority in the Court of Appeal rightly held that the words of this charterparty were unambiguous and that no commercial usage such as is suggested by the appellants was established.

The House took time for consideration.

1939. June 29. LORD ATKIN. My Lords, I have had an opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Wright. I entirely agree with it, and for the reasons which he has given I find myself unable to agree with the decision of the Court of Appeal. I move that this appeal be allowed.

LORD MACMILLAN. My Lords, I also have had the advantage of reading in print the views about to be expressed by my noble and learned friend Lord Wright, and also those embodied in the opinion of my noble and learned friend Lord Porter which will shortly be laid before the House. With the views there expressed I find myself in entire concurrence.

LORD WRIGHT. My Lords, this appeal raises an important question in the law of carriage of goods by sea which has given rise to difference of judicial opinion. Goddard J. decided in favour of the appellants, but his decision was reversed by a majority of the Court of Appeal, consisting of Slesser and Clauson L.JJ. Greer L.J., who dissented, agreed with Goddard J. The substantial question is whether the

(1) (1886) 12 App. Cas. 11.

(2) Ibid. 18.

appellants' vessel, the *Indian City*, had deviated in calling for bunkers at Constantza while on a voyage from Poti to Sparrow's Point, U.S.A. The vessel grounded at Constantza and sustained considerable damage, besides incurring salvage, general average and other expenses.

The appellant company at the material time owned twenty-eight vessels, of which nineteen, including the *Indian City*, were capable of being readily converted into either oil or coal burners. In 1930 cheap fuel oil for bunkers became available at Constantza in Roumania. Constantza, thereupon, became largely used as a bunkering port, in particular for vessels bound from the Black Sea on long ocean voyages. In 1932 and 1933, 114 oil-burning vessels called at Constantza for bunkering only. This figure shows the importance of the port as a bunkering port. It is not necessary to analyse closely what proportion of oil-burning vessels sailing through the Bosphorus on ocean voyages bunkered at Constantza. It is sufficient for purposes of this case to record what has been accepted on both sides, namely that 25 per cent. of the whole number called and bunkered at Constantza in the three-and-a-quarter years before the casualty which overtook the *Indian City*. I emphasize these facts, because the position of Constantza as a usual and recognized bunkering port in the Black Sea seems to me to be a key point in the case.

The charterparty in respect of which the dispute arose was dated September 1, 1933. It was between the appellants as shipowners and the Manganexport G.m.b.H. as charterers and was for three vessels to be nominated by the appellants. The vessels were to be of 8300 tons minimum and 9000 tons maximum capacity and were to proceed with all convenient speed to Nicolaieff or Poti as ordered on arrival at Istanbul, and there load ore and proceed with all convenient speed to one of a range of U.S.A. ports at charterers' option. The vessels were to be addressed for Custom House business to charterers' agents at the port of loading, and were to apply there to Soyusmetimport for cargo. It was also stipulated that the vessels were to be consigned to Sovflot Nicolaieff or Sovflot Poti for loading and Custom House business. The contract provided that the owners were not to be called upon to take bunkers from charterers; and it was stated that the vessels would be burning oil. The contract gave the steamers liberty (inter alia) to call at any port or ports in any order or places to bunker and other purposes and to deviate for saving life or property.

The contract was for one steamer monthly in October, November, December, 1933. The *Indian City* was the third steamer nominated.

This charterparty was the eighteenth charter entered into between the appellant company and the charterer in this trade. Before the voyage of the *Indian City*, the appellants made twenty-eight voyages in the trade, nineteen for the same charterer, which was a Russian State Trading Corporation, and nine for other Russian State Trading Corporations. Except on the first of these voyages, that performed in July, 1930, by the *Orient City*, which bunkered at Constantza on her way to Poti to load, all the appellants' vessels bunkered at Constantza on their voyage. In each case some departure from the shortest sea route from the loading port to the Bosphorus was involved. The extra distance steamed in these cases was considerably greater where the loading ports were situated in the eastern part of the Black Sea, as were Poti, Batoum or Novorossisk. The extra distance amounted approximately to 120 miles in the case of Novorossisk, and to 193 miles in the case of Poti. Where the port of loading was in Ukrainia the extra distance to be steamed in order to bunker at Constantza was fourteen or twenty-one miles, according to the port of loading; when the loading port was in the Crimea or Sea of Azov the extra distance might be about eighty miles.

The master of the *Indian City* was instructed by his owners to fuel at Constantza after loading his cargo. On arrival at Poti, Backal, who was manager at that port of Sovflot, a Russian State Corporation which was acting as charterers' agents, came on board and said he was acting as the ship's agent. He was the only person there who spoke English. The master arranged all the ship's business with him and in particular told him that he was bunkering at Constantza and gave him a cable for transmission to the oil suppliers at Constantza, ordering oil bunkers for the steamer at that port. A similar procedure had been followed in the case of the other two vessels nominated under this charterparty, and also in the case of other vessels on voyages from the Black Sea to distant ports under similar charters between the appellants and the same charterers.

The respondents in this appeal are an insurance company which was sued under the guarantee which it gave to the appellants at the request of the charterers to pay any contribution in general average, salvage or special charges due in respect of the cargo and to admit a loss of freight in general average, and also to be responsible for a balance of freight withheld, so far as the same might be held to be properly due and payable by the charterers. This agreement was in consideration of the appellants agreeing to release their lien, which they did when the cargo was eventually delivered at Rotterdam on the termination of the voyage to that port, which was substituted by agreement for the contract voyage in consequence of the damage sustained at Constantza. It is not now disputed that the liability of the respondents under this guarantee is the same as the liability of the charterers under the freight contract. That liability depends on whether the *Indian City* had deviated from the contract voyage by calling for bunkers at Constantza, so as to have lost the right to claim, in respect of the damage, expense and losses consequent on the grounding at Constantza, the protection of the exception clauses which were contained in the charterparty and which were in the usual form including perils of the seas and negligence. As the property in the cargo remained throughout at all material times in the charterers, the charterparty provisions are the contractual terms which govern the position.

The appellants do not rely on the liberty to call for bunkers which is expressed in the charterparty. That liberty accordingly need not be further considered. Their case is that what was done in calling for bunkers at Constantza was not a deviation or departure from the contract voyage, but was within the contract voyage, because the vessel was pursuing

H. L. (E.)
1939
REARDON SMITH LINE, LD. v. BLACK SEA AND BALTIC GENERAL INSURANCE CO.
Lord Wright.

a usual and reasonable commercial route for carrying out that particular adventure. Its contention was that the charterparty words " shall with all convenient speed proceed " to . . . . Sparrow's Point " imported by necessary intendment that the vessel should proceed by a usual and reasonable route, and that the ascertainment or identification of what was a usual and reasonable route depended on evidence, since the Court, not being possessed by itself of expert navigational or mercantile knowledge, must, if need be, call in aid such evidence. This is not because the contract is ambiguous, but simply that it does not write out in full what the parties are assumed to know or to be able to ascertain. It is only an instance of the familiar rule that evidence is admissible, not of the parties' intention, but of the surrounding circumstances, in order to identify what the parties were contracting about and to identify the subject-matter of the contract. Such evidence must not contradict any express term of the contract. For example, if it had been stipulated that the vessel should not call at Constantza, the evidence would have been inadmissible. But where, as here, there is no such inconsistency between the evidence and the document, the evidence is not merely competent, but may be necessary if the Court is to give effect to the contract. The general rule is that stated by Blackburn J. in *Grant* v. *Grant* (1): " The general " rule seems to be, that all facts are admissible which tend " to show the sense the words bear with reference to the "surrounding circumstances of and concerning which the "words were used, but that such facts as only tend to show "that the writer intended to use words bearing a particular "sense are to be rejected." The question here is what sense is to be attributed to the words "proceed with all convenient "speed from Poti to Sparrow's Point," that is, proceed from the one terminus to the other. The contract voyage has to be identified. It must refer to some route or other. It cannot be said as a matter of law that the meaning is necessarily by the direct sea track. In *Frenkel* v. *MacAndrews* (2) Lord Dunedin quotes from Wills J. in *Evans, Sons & Co.* v. *Cunard*

(1) (1870) L. R. 5 C. P. 727, 728. (2) [1929] A. C. 545, 557.

Steamship Co. (1), the statement that the expression "the "voyage from Bari to Liverpool" must be understood in a business sense, which were the words used by Lord Herschell in *Glynn* v. *Margetson & Co.* (2) Lord Dunedin then proceeds: "That case (i.e., *Evans'* case (1)) puts an end to the "idea of the geographical route being the only route. It "lets in the evidence of what the route under the circumstances "of the ship really was. Many cases may be figured where "there is more than one route which might be used by a ship. "It might be a choice between the Suez Canal, the Panama "Canal, or round Cape Horn. In such a case even if the "port of starting and of destination were stated, it would be "necessary to make inquiry to find out which was the usual "route." Again in *Frenkel's* case (3) Lord Sumner to the same effect said that evidence in that case was needed to prove what the voyage was and, being admitted, showed what was a usual commercial route, which in his Lordship's opinion was reasonable under the circumstances. Lord Sumner again (4), after referring to opinions of Lord Esher and Lord Herschell in *Glynn's* case (2), goes on to say: "The mention "of other matters, all of them depending on facts relating "to the circumstance of trade and navigation and varying "somewhat as time goes on and progress takes place, really "shows how clearly these great authorities desired to guard "themselves in view of the fact, that on many grounds deviation from the sea-track might still not be beyond the ordinary "route. . . . . Such things must be matters of degree, and "may not always be equally important for all classes of ships, "all kinds of cargo, or all periods of trade." In *Frenkel's* case (5) certain earlier decisions were discussed and distinguished. Thus *Leduc & Co.* v. *Ward* (6) was a case where goods were shipped on a general ship for carriage from Fiume to Dunkirk. The vessel, instead of proceeding direct to Dunkirk, sailed for Glasgow and was lost with her cargo at the mouth of the Clyde. It was not suggested that she was pursuing

(1) 18 Times L. R. 374.
(2) [1893] A. C. 351.
(3) [1929] A. C. 561.
(4) [1929] A. C. 563.
(5) Ibid. 545, 557.
(6) 20 Q. B. D. 475.

a usual route in any sense. A plea that the shippers knew and agreed that the vessel was intended to proceed via Glasgow was irrelevant because the plaintiffs were indorsees of the bill of lading, and were entitled to enforce the bill of lading according to its terms. The only other plea, which was a plea based on the deviation clause, failed because the liberty to call at any ports in any order meant ports which were substantially ports which would be passed on the named voyage. There was no question, as Lord Dunedin pointed out, in *Leduc's* case (1), of alternative routes or a customary route which might displace the geographical route. On that footing Lord Esher spoke of the voyage being one on the ordinary sea track from Fiume to Dunkirk, but added that an exact line is not meant, "for it would necessarily vary somewhat "according to circumstances; the ordinary track for sailing "vessels would vary according to the wind; the ordinary track "for a steamer, again, might be different from that for a sailing "vessel; I mean the ordinary track of such a voyage according "to a reasonable construction of the term." Obviously in proper cases this would let in evidence of what the voyage was. In *Glynn* v. *Margetson & Co.* (2) the steamer was a general ship; oranges were to be carried from Malaga to Liverpool; the vessel after loading the oranges proceeded from Malaga up the east coast of Spain, then returned to Malaga, before proceeding to Liverpool. There was no claim that such a voyage was a usual or reasonable course, or was in a business sense within the voyage described in the contract. The defence was based on the deviation clause, which gave a very wide liberty to call at ports. The House held that, however wide the words were, the liberty was limited to ports "in the course of the voyage." Lord Herschell said he was using these words in a business sense. "It "may be said," he observed, "that no port is directly in the "course of the voyage . . . . inasmuch as in merely entering a "port or approaching it nearly you deviate from the direct "course between the port of shipment and the ultimate port "of destination. That is perfectly true; but in a business

(1) 20 Q. B. D. 475.

(2) [1893] A. C. 351.

H. L. (E.)
1939
REARDON SMITH LINE, LD. v. BLACK SEA AND BALTIC GENERAL INSURANCE CO.
Lord Wright.

"sense it would be perfectly well understood to say that there "were certain ports on the way between Malaga and Liverpool, "and those are the ports at which I think the right to touch "and stay is given." I quote these observations because, though in a slightly different connection, they recognize the necessity of ascertaining what is the understanding of business men on the matter, presumably by appropriate evidence. In *Frenkel's* case (1) the authorities last cited were distinguished. I disregard a subsidiary point which was raised in that case on the form of the bills of lading. The real distinction drawn was that there was evidence showing that the contractual voyage was not the direct or ordinary sea route ; in fact the vessel after loading the barrel of olive oil at Malaga with destination for Liverpool went up the Spanish coast in the Mediterranean to various ports to Palamos, close to the French frontier, before she proceeded towards England. The shipowners did not rely on the deviation clause. They contended that the steamer was on the contract voyage and had not departed from it when the oil was damaged in a storm between Malaga and Cartagena. In support of their contention they relied on the evidence which showed that the route taken was a usual commercial route for the vessel to follow under the circumstances, and was the route which had been advertised for her for the voyage some time beforehand and was a route which was (as Lord Sumner in fact held) reasonable under the circumstances. Lord Sumner added (2) : "I cannot see that it is the less a reasonable and usual commer-"cial route, though the evidence referred only to the ships "of the respondents' own line." This shows how remote such evidence is from evidence which would be required to prove a strict custom. Lord Sumner also treated the fact that the course of business was well known to those of the plaintiff's employees to whom he confided this part of his business, as strongly confirming the usual and reasonable character of such a voyage, since no objection was taken, though no estoppel or collateral agreement arose. I may also here quote certain observations from *Morrison & Co.* v. *Shaw, Savill & Albion*

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(1) [1929] A. C. 545.
(2) Ibid. 561.

H. L. (E.)
1939
REARDON SMITH LINE, LD. v. BLACK SEA AND BALTIC GENERAL INSURANCE CO.
Lord Wright.

Co. (1) The vessel in that case was one of a regular line, trading between New Zealand and Europe. The plaintiffs' parcel was shipped in New Zealand for London. The vessel made for Havre to discharge a parcel of meat. This was during the war. The vessel was torpedoed and sunk while near Havre. Evidence was given that the usual and well known route for steamers of this line on the voyage from New Zealand to London which was always substantially followed was by Cape Horn to Montevideo or another named port, then to Teneriffe or Madeira and thence direct to London. The outward voyage was by the Cape of Good Hope. Phillimore L.J., referring to the route as a usual route, said that it needed no liberties or permissions to justify it. He added that the call at the coaling port, which might be Teneriffe or Madeira, did not need the liberty to call at intermediate ports. "This call," he said (2), "is one of the incidents of the voyage "and is no departure. There are many similar instances, "such as calling at weather stations to enquire about ice, "or going to some station for a Government pass through "territorial waters, or to pick up a pilot, or calling at a pre-"liminary port to lighten the ship in order that she may "finish the voyage with less draught. These are not, in my "view, departures from the usual and customary course of the "voyage." That case illustrated the serious consequences of a deviation, because the shipowners were held not to be entitled to rely even on the exception of the King's enemies to which carriers are generally entitled even in the absence of a special contract. The effect of even an accidental deviation, if not justified, is illustrated in *Hain Steamship Co.* v. *Tate & Lyle, Ld.* (3), where the deviation was due to an error in transmitting orders to the master. No one would seek to minimize the importance of the rule that a vessel must not deviate, without justification, from the contract voyage; but that makes it also essential to ascertain correctly what the contract voyage is.

The cases cited above were cases of liners or general traders, and it may be said that the same principles do not apply in the same sense to a chartered vessel, carrying a single cargo for a single shipper or consignee. But even in such cases it is obvious that there will be in general various considerations, commercial or navigational, which determine what sea route is usual and reasonable. Thus in the old sailing ship days, routes were chosen in order to make use of trade winds, and varied from season to season, and between the same termini there might be several usual routes. In modern times in all long ocean voyages, the need to replenish bunkers (coal or oil) has to be considered. The doctrine of stages of the voyage which enables a shipowner to start with bunkers sufficient for the stage, so long as he fills up his bunkers at the next bunkering port, necessarily involves calling at that port, and also perhaps, later ports, in order to fulfil the recurring obligation to keep the vessel seaworthy in regard to bunkers. Thus to call at such ports has become an ordinary incident of the voyage. The need to do so may help to determine the general route, for instance, whether it is to be by the Cape of Good Hope or the Suez Canal. A shipowner is entitled, within certain limits determined by what is reasonable, to be guided in his choice of bunkering ports by considerations of cheapness and convenience. Thus evidence was given in this case that it is usual for a coal-burning ship bound to Australia by the Cape of Good Hope to bunker at Durban, where coal is cheaper instead of at Cape Town, though Durban is farther off the route. Other similar instances were given in evidence. In the voyages here in question various choices are open to the shipowner when his ship is burning oil. He may fill up his bunkers for the whole voyage at Constantza on his way to the loading port. That course may be objected to by the charterer because it may reduce the quantity of cargo his ship can load, and for the same reason may be disadvantageous to the shipowner. He may decide to fill up his bunkers after sailing from the port of loading at some convenient port. He may decide to do this at Constantza, at Istanbul, or at Algiers, or at Oran, or at Ceuta, all of which are available bunkering ports, starting from the loading port with sufficient bunkers to take the ship to the next

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(1) [1916] 2 K. B. 783.
(2) Ibid. 797.
(3) (1936) 41 Com. Cas. 350.

H. L. (E.)
1939
Reardon Smith Line, Ld.
v.
Black Sea and Baltic General Insurance Co.
Lord Wright.

bunkering port which he decides to use. In this way he selects the stage for bunkering. The vessel must be seaworthy for that stage, but it is the shipowner's province to fix the stage, that is, to determine where he will bunker, so long as his decision is reasonable and usual. In the present case, as in the other voyages during the relevant period, the appellants selected Constantza as the bunkering port. Their case is that they had done so a great many times without objection and save in this one case without mishap. They relied on all the evidence to which I have briefly referred to support their claim that the route by Constantza is a usual route. The position therefore is that to call at some port for bunkers is no deviation, and the only question is whether Constantza is a usual and reasonable port of call for this purpose.

I agree with Greer L.J. that the evidence that 25 per cent. of oil-burning vessels sailing from the Black Sea on ocean voyages call at Constantza for bunkers is sufficient to show a usual route. The shipowner is not here attempting to prove a custom. To prove a custom he would have to show that it was uniform and universal in the trade, but that is not what is in question here. Nor need he show that other routes were not available, that is, that there were not alternative ports of call at which he might bunker. There are no doubt other available ports of call for this purpose, some, and perhaps all, of which would involve much less extra steaming. I think the shipowner is entitled to balance the cost to him of extra steaming against the cheapness or convenience of Constantza, so long as to do so is not unreasonable in regard to the interests of the charterer or any other persons who might be concerned. It is obvious that to put into any port to bunker involves not merely extra steaming, either more or less, but the entry into and departure from an extra port, which in itself is a separate risk however close it may be to the direct ocean route. Again it is said that the habit of bunkering at Constantza sprang up suddenly in 1930, and ceased as suddenly in 1935, at least so far as concerned the practice of the appellants. But I think a commercial habit or practice like the one claimed, may come into existence in a short time and cease as rapidly. In modern business, things are constantly changing and commercial habits may change as rapidly. That the practice of calling at Constantza for bunkers was not unreasonable is also, I think, supported by the evidence that it was well known to responsible officials who represented the charterers on the spot, and that they never objected. I refuse to believe that, if the charterers' interests had been prejudiced, they would not have objected. I refuse to believe in view of all the evidence that the practice was not well known. I do not treat this evidence as evidence of a waiver, or an agreement to vary the contract, which might raise questions of authority to vary a written contract. I merely regard it as Lord Sumner did in *Frenkel's* case (1) as confirming the usual and reasonable character of such a voyage, which is fairly inferred from the fact that no objection was taken.

As the necessity of using ports of call for bunkering is so obvious, I think that less evidence is needed to justify that it is usual and reasonable to use a port like Constantza for that purpose, than if the ship had gone there for purposes of trade. But I do not think it necessary to lay down any specific measure of departure from the direct sea route which may be held to be reasonable. If I am asked how far I go, I say that I go as far as this case requires. The test of what is usual and reasonable in a commercial sense may arise in very different circumstances and must be decided whenever it arises by the application of sound business considerations and by determining what is fair and reasonable in the interests of all concerned.

I have found myself unable to concur in the reasons which led Slesser and Clauson L.JJ. to reverse the decision of Goddard J. Slesser L.J. seems to start from the assumption that the contract stipulates for one voyage only, namely from the port of destination to the port of discharge, being a voyage by the ordinary track by sea. I think he bases that on a view of what was meant by Lord Esher in *Leduc & Co.* v. *Ward*. (2) But as Lord Dunedin and Lord Sumner pointed out in *Frenkel's*

(1) [1929] A. C. 545, 561. (2) 20 Q. B. D. 475.

case (1) Lord Esher was not dealing with a case where there was any question of there being any usual route or routes other than the ordinary sea track. Slesser L.J. next holds that the contract being clear, evidence was not admissible to vary it, unless it went to prove a custom in the strict sense. It is true that, if a contract is clear, it cannot be varied by evidence of a custom or even a trade usage inconsistent with its clear terms; but in my opinion, for reasons which I have explained, the evidence is admissible here not only on general principles but on the particular rulings in *Frenkel's* case (1) in order to ascertain and explain what the parties meant by their contract as applied to the facts of the case. Again, I do not agree with Slesser L.J. that there is any question here of a custom in the strict sense. The evidence, however, to prove a commercial usage is in any event not the same as that necessary to prove a custom say in matters of land law. And, as appears from the authorities I have quoted, the question here is simply what is a usual and reasonable mode of performing the necessary operation of calling for bunkers. I observe that Slesser L.J. adds that, if the evidence were admissible, it might well be that it would prove a usual commercial route.

Clauson L.J. seems to have treated the contract as being for a voyage Poti–Istanbul, and on that basis to have held that it was unambiguous and that there was no possibility of treating the case as a case of alternative routes, Poti–Istanbul or Poti–Constantza–Istanbul. He said that the termini of the voyage were fixed and that there were no navigational alternatives such as were contemplated by Lord Dunedin in *Frenkel's* case. (1) With great respect, I cannot agree with the view that the charterparty does not admit of explanatory evidence. Clauson L.J. himself admits that some owners may prefer to go direct and not call at Constantza, preferring the shorter sea route to the convenience of cheaper bunkers. Perhaps the learned Lord Justice may have been influenced in the view he arrived at by treating the voyage as one from Poti to Istanbul. There was no such

(1) [1929] A. C. 545.

voyage. The voyage was to Sparrow's Point, U.S.A., which was a vitally different voyage, because it involved the necessity of providing the bunker supply for the whole voyage in appropriate stages at the shipowners' reasonable discretion. It is this which was the essence of the whole problem, and led to what were called the navigational alternatives.

For the reasons I have explained, I agree with the judgments of Goddard J. and Greer L.J. I think that the appeal should be allowed and the judgment of Goddard J. restored, and that the respondents should pay the appellants' costs in this House and in the Court below.

Lord Porter (read by Lord Atkin). My Lords, in this appeal your Lordships are asked to reverse the decision of the Court of Appeal, who by a majority reversed the decision of Goddard J.

The appellants are owners of a line of steamers which mostly operated under charter on ocean voyages. At the material date they owned twenty-eight vessels of which nineteen were steamships capable of burning either coal or oil fuel and of being rapidly converted for the use of one or the other.

The ship with which the present appeal is concerned is one of these nineteen and is named the *Indian City*. By a charterparty dated September 1, 1933, the appellants undertook to provide three vessels to be nominated by them to proceed to Nicolaieff or Poti in the Black Sea as ordered by the Trade Delegation of the U.S.S.R. at Istanbul and there take a full cargo of between 8300 and 9000 tons of ore for carriage to a port on the east coast of the United States of America.

Amongst the provisions of the charterparty are to be found the following :—

"(2.) The said ship . . . . shall . . . . proceed with all "convenient speed to Nicolaieff or Poti as ordered and there "load . . . . a full and complete cargo of ore, 8300 tons "minimum not exceeding 9000 tons maximum quantity in "owners option . . . . and being so loaded shall with all "convenient speed proceed to . . . . Baltimore (including "Sparrow's Point. . . . .)."

"(12.) The steamer is to be addressed for the Custom "House business to charterers or their agents at ports of "loading. . . . ."

"(19.) Ship to apply to Soyusmetimport at loading port "for cargo, and wire on leaving last port of discharge 'Soy-"mangan Berlin' and 'Sovflot Istanbul' and 'Soyusmet-"import Moscow'."

"(20.) . . . . stranding . . . . and all and every other "damages and accidents of the seas . . . . of whatever nature "and kind whatsoever, before and during the said voyage "always excepted. Steamer has liberty to call at any port "or ports in any order or places, to bunker."

"(28.) At Nicolaieff or Poti, steamer to be consigned to the "Odessa Freight Office or their agents, Telegraphic address "'Sovflot, Nicolaieff' or 'Sovflot Poti' for loading and "Custom House business."

"(41.) Owners not to be called upon to take bunkers from "charterers. Vessels will be burning oil."

"(43.) General average shall be payable according to York/"Antwerp Rules, 1924, and shall be adjusted in London "in accordance with English law and custom. Guarantee for "cargo's liability for general average contribution and/or "salvage charges shall be given by Messrs. Black Sea and "Baltic General Insurance Company, Limited, 106, Fenchurch "Street, London, E.C.3. . . . ."

The *Indian City* was the third vessel to be nominated by the appellants under this charterparty. She was ordered upon calling at Istanbul to proceed to Poti, where she arrived on December 10, 1933, and loaded a cargo of 8430 tons of ore for Sparrow's Point, Baltimore. After loading she sailed on December 31, 1933, for Constantza on the west coast of the Black Sea for bunkers. In entering that port on January 3, 1934, she ran aground, considerable damage was done to the ship and cargo to the value of 1061*l.* 14*s.* 4*d.* had to be jettisoned. Temporary repairs were completed by March 6, 1934, and she set sail for her destination. In the Mediterranean, however, she began to leak again and was obliged to put into Malta. There it was agreed by all the parties interested that her destination should be changed to Rotterdam, at which port she arrived on April 20, 1934.

As a result of the casualty, the appellants incurred by way of general average sacrifice an expenditure of 6986*l*. 5*s*. 5*d*., and claimed from the charterers their proportion of this sum. The charterers repudiated liability for any general average and withheld the sum of 1061*l*. 14*s*. 4*d*. from the freight in respect of the cargo undelivered. The appellants thereupon refused to deliver the cargo without some security for payment of these two sums if a legal right to their recovery could be established, and in order to surmount this difficulty the respondents entered into a bond dated January 15, 1934, guaranteeing to the appellants the payment of any contributions of general average which might thereafter be ascertained to be properly due in respect of the cargo, and by a later instrument dated March 5, 1934, agreed to treat the loss of freight as if it were general average.

The respondents maintained that in going to Constantza the ship had deviated from her contractual route, and it is admitted that, if they are right in so contending, they are not liable either for the general average claim or for the freight withheld.

The question which your Lordships have to decide therefore is whether in proceeding to Constantza to bunker the *Indian City* deviated or not.

On behalf of the respondents it was said that the appellants were under a duty to proceed from Poti to Sparrow's Point by the direct route through Istanbul. Indeed, in their submission the terms of the charterparty were plain, and no evidence could be given in order to establish the right of the appellants to proceed by any other route. The appellants, on the other hand, maintained that in every case it was permissible to adduce evidence in order to establish what was the usual route and that in the present case they had established by evidence the existence of an alternative route via Constantza for bunkers.

The facts proved in evidence were as follows: Up to the year 1930 no oil fuel was obtainable at the port of Constantza, but in that year cheap oil fuel became available there and in that year the appellants began to charter their vessels to various of the Russian State Trading Corporations upon ocean voyages from the Black Sea with cargoes of ore, grain and salt.

Between July, 1930, when the first of the appellants' vessels to engage in this trade loaded a cargo of ore at Poti, and the sailing of the *Indian City* from that port in December, 1933, the appellants' vessels had made twenty-eight voyages in this trade, on nineteen of which the ships were under charter to the same charterers as was the *Indian City*, and upon the remaining nine voyages the ships were under charter to other of the Russian State Trading Corporations.

On each of the twenty-eight voyages, except the first, the ships had taken fuel bunker oil for the chartered voyage at Constantza after loading their cargoes, and on many occasions the charterers' representatives at the various loading ports had been informed by the captains of the appellants' vessels of their intention to bunker at Constantza after leaving the loading port, and no objection to the adoption of this route had been raised by any of the charterers until the casualty to the *Indian City*.

During this period, oil fuel was much cheaper at Constantza than that which was obtainable at other ports such as Istanbul, Algiers and Ceuta, and the appellants entered into the charters by reason of the fact that oil could be obtained at Constantza at the cheaper price.

The charterparty of September 1 was the eighteenth charterparty into which the appellants had entered with Manganexport in this trade.

At the trial before Goddard J. the appellants gave evidence, (*a*) as to the number of vessels bunkering at Constantza during the years 1932 and 1933; (*b*) as to the route followed by all the appellants' vessels which had loaded at Black Sea ports in the years 1930, 1931, 1932 and 1933; and (*c*) furnished a list of the various vessels sailing from Poti in the years 1931, 1932 and 1933 showing whether or not they called at Constantza to bunker.

The result of that evidence was as follows: In 1932 and 1933 prior to the voyage of the *Indian City* 114 oil-burning vessels called at Constantza for bunker purposes only; in nine cases it was not possible to tell where the vessels loaded their cargoes, but of the remaining 105, in eighty-three instances the vessels bunkered at Constantza after loading their cargoes elsewhere at Black Sea or Danube ports, or, if Danube ports be excluded, the vessels called at Constantza to fuel after loading their cargoes in forty-five out of sixty-five instances.

If, on the other hand, eastern Black Sea ports alone be considered, namely, Novorossisk, Tuapse, Poti and Batoum, of a total of thirty-three vessels which called at Constantza eighteen bunkered after loading, and of those from Poti itself out of twenty-two oil-burning vessels, nine bunkered at Constantza after loading their cargoes. These nine, however, included the *Indian City*, and two vessels which proceeded to Novorossisk before calling at Constantza.

As against this evidence the respondents adduced two lists of vessels sailing from Poti and Novorossisk in the years 1932–3 from which it appeared that out of nineteen oil-burners sailing from Poti, six called at Constantza after loading, and of these six, five belonged to the appellants. These figures exclude the *Indian City*, and the two vessels which sailed via Novorossisk. From Novorossisk the numbers were thirty-six oil-burners, of which eight called at Constantza after loading and four belonged to the appellants.

It was also proved that in the case of chartered vessels other than those belonging to the appellants the representative of the charterers, whether those charterers were Manganexport or other Russian State Trading Corporations, were in a number of instances informed that the vessel intended to call at Constantza for bunkers after loading, and that no objection to this course was taken.

Moreover, in the case of the three ships nominated under the charterparty of September 1, 1933, the first, the *Atlantic City*, loaded at Poti, and her captain not only informed the manager of Sovflot at that port, who was acting as agent for the charterers as well as the ship, that he intended to bunker at Constantza, but before sailing handed to that agent for transmission to Constantza a cable to the suppliers of oil at that port of the expected arrival of the *Atlantic City*.

The second vessel, the *Jersey City*, was ordered to Nicolaieff, and a similar procedure was adopted to that which had taken place at Poti. In the case of the third vessel, the *Indian City*, similar information was given and a similar telegram sent.

In this state of affairs the appellants maintained that to proceed to Sparrow's Point via Constantza for bunkers was to proceed by a usual route, and that they were entitled to adduce the facts proved in evidence in support of their contention.

The law upon the matter is, I think, reasonably plain, though its application may from time to time give rise to difficulties. It is the duty of a ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases for navigational or other reasons, and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charter party or bill of lading. In each case therefore when a ship is chartered to sail or when a parcel is shipped upon a liner sailing from one port to another, it is necessary to inquire what the usual route is. In some cases there may be more than one usual route. It would be difficult to say that a ship sailing from New Zealand to this country had deviated from her course whether she sailed by the Suez Canal, the Panama Canal, round the Cape of Good Hope or through the Straits of Magellan. Each might, I think, be a usual route. Similarly the exigencies of bunkering may require the vessel to depart from the direct route or at any rate compel her to touch at ports at which, if she were proceeding under sail, it would be unnecessary for her to call.

It is not the geographical route but the usual route which has to be followed, though in many cases the one may be the same as the other. But the inquiry must always be, what is the usual route, and a route may become a usual route in the case of a particular line though that line is accustomed to follow a course which is not that adopted by the vessels belonging to other lines or to other individuals. It is sufficient if there is a well known practice of that line to call at a particular port.

These principles have been set out in at least two cases, one of which was decided in your Lordships' house; the first is *Evans* v. *Cunard Steamship Co.* (1), and the second *Frenkel* v. *MacAndrews.* (2) Each case, it is true, was concerned with a parcel of goods shipped on board a liner, and to that extent it may be said that there was a particular defined route or several defined routes known to be followed by the vessels of that line. But I do not think that the decisions turn solely upon that fact.

The observations of Lord Dunedin and Lord Sumner in *Frenkel* v. *MacAndrews* (2) are of more general application. "There may be," said Lord Dunedin (3), "either alternative "routes or a customary route which in either case might displace the geographical route." And on the same page he quotes from *Evans* v. *Cunard Steamship Co.* (1) the words of Wills J.: "The description of the particular voyage agreed upon must "be the key note to which the bill of lading must conform. "What then is meant by 'the voyage from Bari to Liverpool'? "Lord Herschell says the expression must be understood in a "business sense. In *Glynn* v. *Margetson & Co.* (4) there "was no evidence as there is in this case that the only practicable way to get a cargo from Bari to Liverpool is by a more "or less uncertain route via the Adriatic round by Levantine "or Black Sea ports."

The noble and learned Lord proceeds: "That case puts "an end to the idea of the geographical route being the only "route. It lets in the evidence of what the route under the "circumstances of the ship really was."

Lord Sumner (5) says: "Evidence was needed to prove

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(1) 18 Times L. R. 374.
(2) [1929] A. C. 545.
(3) Ibid. 557.
(4) [1893] A. C. 351.
(5) [1929] A. C. 561.

"what that voyage was and that evidence was tendered "and was admitted without objection. Its effect was that "the ship, having shipped the oil at Malaga, was to proceed "' via Levante,' calling at various ports as far eastward and "north-eastward as Palamos, and, returning thence, calling "at other ports, until, having passed Malaga without calling "again, she proceeded ' directo ' for the United Kingdom. "No question arises here as to the precise meaning of ' via "Levante ' or as to the ports to be called at and the order "of the calls, which that expression may connote. This was "shown to be a usual commercial route for the *Cervantes* "to follow under the circumstances and to be the route which "had been advertised for her for this voyage some time "beforehand, and it was one which I think was reasonable "under the circumstances. I cannot see that it is the less a "reasonable and commercial route, though the evidence referred "only to the ships of the respondents' own line. Their "prominent position in this trade, the number of ships they "run, and the length of time that this kind of practice has "been followed by them all go to prove this conclusion. The "evidence further shows that these facts were well known to "those of his employees, to whom the plaintiff confided "this part of his business, and the usual and reasonable "commercial character of such a voyage was thereby strongly "confirmed, since no objection was taken."

It was said, however, on behalf of the respondents that the main ground of the decision in *Frenkel's* case (1) was that neither the port of departure nor the port of destination were set out in the bill of lading, and that for that reason only evidence was admissible to ascertain the ports of departure and arrival and the course to be followed between them.

The speeches in your Lordships' house undoubtedly took the omission into consideration in reaching the conclusion at which they arrived, but I do not read the observations as confined to that ground or necessarily dependent upon it. I think that both your Lordships' house and the Court of Appeal took the wider view that in every case evidence is admissible to show

(1) [1929] A. C. 545.

what is the usual or a usual route, and that, if the evidence adduced is sufficient to establish a practice to follow a particular route, proceeding by that route would not be a deviation.

Such a conclusion in no way weakens the authority of or contradicts the principles laid down in *Leduc & Co.* v. *Ward* (1) and *Glynn* v. *Margetson & Co.* (2) In those cases the question was not what was the route prescribed by the bill of lading whether by custom or otherwise as that to be followed, but whether it was permissible when once that route was ascertained to deviate from it.

In the present case no question of deviation from the contractual route arises. It is conceded that, if the appellants were not entitled to proceed to Constantza as part of their ordinary route, the deviation clause will not avail them.

Any doubt which I have felt in the present case has not been as to the principles applicable, but whether the evidence was sufficient to establish the voyage via Constantza as a usual route for the appellants' vessels from Black Sea ports to America and other ports to be reached by ocean voyages. Upon consideration, however, I think there was enough to enable the learned judge rightly to find that a customary route was followed, and I see no necessity for differing from the view expressed by him and by Greer L.J.

But in saying this I must not be taken to desire in any way to weaken the obligation of a shipowner to proceed by a usual course. The obligation remains, but as was recognized in *Frenkel's* case (3), evidence may always be adduced to show what the usual course is. It is in this, I think, that the majority of the Court of Appeal have erred. In their view evidence was not permissible; in my view, unless a specific route is laid down in the charterparty or bill of lading, it is always permissible and may be essential. No doubt prima facie the route direct from Poti to Sparrow's Point through Istanbul would be the ordinary course, but I think that in this case we have evidence sufficient to show that the route has been

(1) 20 Q. B. D. 475.
(2) [1893] A. C. 351.
(3) [1929] A. C. 545.

varied and that the practice of proceeding to Constantza to bunker after loading had become a usual one. It is true that a considerable number of vessels proceeding from Black Sea ports do not call at Constantza for bunkers, and that, if one is to take particulars of Poti and Novorossisk alone, only about one-quarter of the ships proceeding on ocean voyages call at Constantza after loading. It is true also that the journey to Constantza lengthens the voyage by some 200 miles, and that shortly after the accident to the *Indian City* the cost of oil at Constantza increased and the appellants thereafter have taken their bunkers from Algiers instead of Constantza.

All these are matters to be considered, but a short usage, particularly where the obtaining of bunkers is concerned, may still be a sufficient usage to create a usual route.

I do not for myself place much reliance upon the argument that the representative of the respondents heard of and forwarded instructions as to the intention of bunkering at Constantza. He neither had power to nor did he purport to vary the prescribed route. Nevertheless it is, I think, an element to be considered, not as altering the contract, but as showing the usual reasonable and commercial character of such a voyage.

In coming to this conclusion I find myself in agreement with Goddard J. and Greer L.J. and reach a conclusion which might have been that of Slesser L.J. had he not thought no evidence as to the route to be followed was admissible. Nor do I find myself in disagreement with Clauson L.J. when he says that a ship sailing from Poti to Istanbul would not pursue a usual course if she proceeded via Constantza. It might be difficult to prove that such a voyage was other than a deviation. But the transit with which we are concerned is one not to Istanbul but to Sparrow's Point, and for such a voyage the increase in distance may be of little or no importance.

It is not necessary to prove a custom in the strict sense, and the evidence given is, as I think, admissible and sufficient to establish the voyage via Constantza as a usual route.

H. L. (E.)

1939

Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co.

I would allow the appeal and restore the judgment of the learned judge.

Lord Atkin. My Lords, I am asked by my noble and learned friend Lord Thankerton to say that he agrees with the opinions that have been delivered.

Appeal allowed.

Solicitors for appellants : *Botterell & Roche.*
Solicitors for respondents : *Thomas Cooper & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*

1939

May 11; *June* 29.

DOBSON SHIP REPAIRING COMPANY, LIMITED . . . . APPELLANTS;

AND

BURTON . . . . RESPONDENT.

Workmen's Compensation—Infant apprentice—Accident—Application for review of weekly payment—Whether letter a sufficient application—" Review "—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 11, *sub-s.* 2—*Workmen's Compensation Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 42), *s.* 1.

The expression " application for the review " in s. 1 of the Workmen's Compensation Act, 1926, in respect of an award in favour of an infant workman, does not require that the application should be made to the Court; the words are satisfied by a letter to the employer making a definite application for the review.

Vickers-Armstrongs v. *Regan* [1933] 1 K. B. 232 approved.

Decision of Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal.

The respondent, who was born on June 12, 1916, entered upon a seven years' apprenticeship with the appellants on February 23, 1931. In August, 1932, he met with an accident, causing the loss of his right eye, and was paid compensation until January 23, 1933, on which date he returned to work. On February 10, 1933, he met with a second accident, which caused only slight injuries, but induced him to give up his apprenticeship and work as a baker's roundsman for his mother. On October 13, 1933, the respondent filed an application for arbitration, and in November he was awarded a declaration of liability only, as he was earning in the employment of his mother as much as or more than he would have been earning as a shipwright's apprentice. On June 14, 1937, the respondent attained the age of twenty-one years, and, thinking that his apprenticeship ended at that age, he applied to the county court for a review of his weekly payment. The application was dismissed, without prejudice to his right to make a further application for compensation, declaration of liability or otherwise, on the ground that his wages from his mother amounted to 35*s*. a week, whereas his wages in his last year as apprentice would have been 30*s*. only. The county court judge accordingly found that the respondent was not then suffering any loss of wages, but that there was a probability of loss of earning capacity in the future. On December 8 the respondent's solicitors wrote to the appellants saying "my client applies "for a review and asks for a weekly payment in respect of his "partial incapacity at 18*s*. a week." The appellants not acceding to that application, the respondent applied to the Court for an arbitration with respect to review. The arbitration was held, and the judge found that the respondent's average weekly wages as a shipwright on the termination of his apprenticeship would have been 60*s*., whereas his earnings were only 35*s*. He accordingly made an award of 12*s*. 6*d*. a week, starting from February 24, 1938.

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* *Present:* LORD MAUGHAM L.C., LORD WRIGHT, and LORD PORTER.

The company appealed to the Court of Appeal, maintaining that the respondent had not taken the requisite steps to entitle him to a review, inasmuch as the solicitor's letter was not an "application" such as was contemplated by the Act, and that what was contemplated was an application to the Court. The Court of Appeal rejected this contention, and held that the county court had power to review the weekly payments as from the expiry of the respondent's term of apprenticeship.

The company appealed to this House.

Sir William Jowitt K.C. and *J. Alun Pugh* for the appellants. The first question is, what is meant by the words "application for review" in the case of a workman who at the date of the accident was under twenty-one years of age? The Workmen's Compensation Act, 1925, in dealing with reviews of weekly payments, provided by s. 11, sub-s. 2, that where the workman was under age at the date of the accident and the review took place more than six months after the accident and before the workman attained twenty-one, the amount of the weekly payment might be increased to such an amount as would have been awarded if the workman had at the time of the accident been earning the weekly sum which he would probably have been earning at the date of the review if he had remained uninjured. That sub-section was amended by s. 1 of the Workmen's Compensation Act, 1926, as follows: "In sub-"section (2.) of section eleven of the Workmen's Compensation "Act, 1925 (which relates to reviews of weekly payments to "workmen who were at the date of the accident under twenty-"one years of age) for the words 'and before the workman "'attains the age of twenty-one years' there shall be "substituted the words 'and the application for the review "'is made before or within six months after the workman "'attains the age of twenty-one years.'" Do the words "application for the review" mean an application to the Court, or are the words satisfied by a letter sent to the employers by the solicitors acting for the present respondent? We contend that an application to the Court is necessary, and, if that is right, no application was made within the time limited, namely, within six months of the respondent attaining the age of twenty-one: *Jones* v. *Meiros Colliery Co.* (1) In *Gibson & Co.* v. *Wishart* (2), which overruled *Donaldson Brothers* v. *Cowan* (3), an "application for review" was made to the Court, and that would appear to have been the procedure followed in *Talbot* v. *Vickers.* (4) Indeed in *Curran & Co.* v. *Kays* (5) it would appear to have been conceded in argument that a letter did not constitute an "application for review": see also *Sharp Brothers* v. *Knight.* (6) It is true that in *Vickers-Armstrongs* v. *Regan* (7) the Court of Appeal held that a letter might constitute an "application" for review, and it is against that decision that the present appellants are appealing. When the Legislature in 1926 used the words "and the application "for the review is made before or within six months after the "workman attains the age of twenty-one years," it must be taken to have acted upon what had been the practice in the Courts of England and Scotland, namely, treating an application for review as necessarily involving an application to the Court. Alternatively we say that if a mere letter satisfies the requirement of an "application," the sum that can be awarded

(1) (1926) 19 B. W. C. C. 182.
(2) [1915] A. C. 18.
(3) 1909 S. C. 1292.
(4) [1925] 2 K. B. 682.
(5) [1928] 2 K. B. 469.
(6) (1932) 25 B. W. C. C. 86.
(7) [1933] 1 K. B. 232.

is that which the workman would probably have been earning at the date of the review, namely, December 8, 1937, on which date he would have been earning less than what he was in fact receiving from his mother.

A. T. Miller K.C. and *W. K. Carter* for the respondent. The decision of this House in *Powell* v. *Main Colliery Co.* (1) is of the greatest assistance in arriving at the true meaning of the words here in question, for in that case it was laid down that " the claim for compensation " meant, not the initiation of proceedings before the tribunal, but a notice of a claim for compensation sent to the workman's employer. But even apart from authority we submit that the ordinary meaning of the words used is such as is satisfied by the sending of a solicitor's letter. "Application " means any application to the employers, and it is only on the failure of agreement that the proceedings by arbitration come into operation. When the Acts mean an application to the Courts they say so, either in express terms or by necessary implication. *Vickers-Armstrongs* v. *Regan* (2) was correctly decided and should be followed.

Sir William Jowitt K.C. replied.

The House took time for consideration.

1939. June 29. LORD WRIGHT. My Lords, the opinion which I am about to read is the speech of my noble and learned friend Lord Porter. I am authorized by my noble and learned friend the Lord Chancellor to say that he has read and considered that speech, and is in agreement with it. I may say that I also have had the same advantage and that I agree with the speech of Lord Porter.

LORD PORTER (read by LORD WRIGHT). My Lords, the dispute in this case arises under the Workmen's Compensation Act, 1925, as amended by the Act of 1926. The question to be determined is, what steps are required to be taken by a workman injured before he is twenty-one years of age in order to obtain a revision of the amount of his compensation so as to

(1) [1900] A. C. 366.

(2) [1933] 1 K. B. 232.

Lord Porter.

entitle him to receive an award based not on the weekly amount which he was receiving at the date of the accident, but on the amount he would probably have been receiving after he attained his majority.

The point at issue is best approached by considering the changes to be found in the wording of the various Workmen's Compensation Acts beginning in 1897 and ending in 1926.

Under the original Act the amount which an injured workman could recover was determined once for all, and was either half the difference between his average weekly wages before disablement and those he could earn afterwards or a lump sum. For the purposes of the present case the lump sum may be ignored.

When the Act of 1906 was passed, it was apparently felt that the position of workmen who were under twenty-one at the time of injury required special consideration. Accordingly by proviso (*b*) to s. 1 of the First Schedule it was enacted that in the case of a minor the whole average weekly wage subject to a limit of 10*s*. should be given as compensation if his average weekly wages were less than 1*l*. And by a proviso to s. 16 of the same Schedule it was further enacted that: "Provided "that where the workman was at the date of the accident "under twenty-one years of age and the review takes place "more than twelve months after the accident, the amount of "the weekly payment may be increased to any amount not "exceeding fifty per cent. of the weekly sum which the workman "would probably have been earning at the date of the review "if he had remained uninjured, but not in any case exceeding "one pound." This provision remained in force until the Act of 1923 was passed, when by s. 24, sub-s. 6, there was substituted for the proviso to s. 16 of the First Schedule to the Act of 1906 the provision following: "Provided that, where "the workman was at the date of the accident under twenty-"one years of age, and the review takes place more than six "months after the accident, and before the workman attains "the age of twenty-one years, the amount of the weekly "payment may be increased to such an amount as would have "been awarded if the workman had at the time of the accident "been earning the weekly sum which he would probably have "been earning at the date of the review if he had remained "uninjured." The result of this change was that the infant workman could claim to have his compensation increased after six months had elapsed from the date of the accident, but the review had to take place before he was twenty-one. At the same time his revised compensation was no longer limited to 1*l.* per week. Except that it is contained in a substantive enactment and not by way of proviso, the same wording is adopted in s. 11, sub-s. 2, of the Act of 1925.

It is idle to speculate as to what object induced Parliament in passing the Bill to enact that the review must take place before the workman attained twenty-one, but the result was that in *Jones* v. *Meiros Colliery Co.* (1) the Court of Appeal held that an infant workman who was injured but did not apply for a review until after he attained twenty-one, was not entitled to any variation in the amount of his compensation.

After, and probably as the result of, this decision the Workmen's Compensation Act, 1926, again altered the wording, and the first two sub-sections of s. 11 of the Act of 1925 as amended by the Act of 1926 are now worded as follows: "Any "weekly payment may be reviewed at the request either of "the employer or of the workman, and on such review may "be ended, diminished, or increased, subject to the maximum "hereinbefore in section nine provided, and the amount of "payment shall, in default of agreement, be settled by "arbitration under this Act."

"Where the workman was at the date of the accident under "twenty-one years of age and the review takes place more than "six months after the accident and the application for the "review is made before or within six months after the workman "attains the age of twenty-one years, the amount of the "weekly payment may be increased to such an amount as "would have been awarded if the workman had at the time of "the accident been earning the weekly sum which he would "probably have been earning at the date of the review if he "had remained uninjured."

(1) 19 B. W. C. C. 182.

In the case under consideration the facts proved were as follows :—

(1.) February 23, 1931. The respondent, who was born on June 12, 1916, entered upon a seven years' apprenticeship as shipwright with the appellants.

(2.) August 31, 1932. The respondent met with an accident causing the loss of his right eye and 4*s*. 11*d*. a week was paid as compensation until January 23, 1933.

(3.) January 23, 1933. The respondent returned to work.

(4.) February 10, 1933. The respondent met with a second accident which caused only slight injuries, but induced him to give up his apprenticeship and work as a baker's roundsman for his mother.

(5.) October 13, 1933. The respondent filed an application for arbitration.

(6.) November 7, 1933. In the consequent proceedings the respondent was awarded a declaration of liability only, as he was earning in the employment of his mother as much as or more than he would have been earning as a shipwright's apprentice.

(7.) June 12, 1937. The respondent reached twenty-one years of age.

(8.) August 26, 1937. The respondent, thinking that his apprenticeship ended at the age of twenty-one, applied to the county court for a review of his weekly payment. This application was dismissed without prejudice to the right of the applicant to make a further application for compensation, declaration of liability or otherwise, on the ground that the respondent's wages from his mother amounted to 35*s*. a week whereas his wages in his last year as shipwright's apprentice would have been 30*s*. only. The learned county court judge accordingly found that the respondent was not then suffering any loss of wages but that there was a probability of loss of earning capacity in the future.

(9.) December 8, 1937. The respondent's solicitor wrote a letter to the appellants in these terms : "Dear Sirs, I have "been instructed by Mr. Frank Burton of 106, Weelsby Street, "Grimsby, formerly in your employ as apprentice shipwright, "and in respect of whose accidental injuries, sustained on the

"31st August, 1932, an award of the Grimsby County Court "was made in the form of a declaration of liability on the "7th November, 1933.

"My client applies for a review, and asks for a weekly "payment in respect of his partial incapacity at 18*s.* a week.

"Yours faithfully,
(Sgd.) Walter West."

(10.) December 12, 1937. Six months had elapsed after the respondent attained twenty-one.

(11.) February 23, 1938. The seven years' apprenticeship would have expired had it not been terminated as the result of the respondent's accident.

(12.) April 26, 1938. The appellants not having acceded to the application for a review and payment of 18*s.* a week, the respondent applied to the Court for an arbitration with respect to review.

(13.) May 19, 1938. The arbitration was held and the county court judge found that the respondent's average weekly wages as a shipwright on the termination of his apprenticeship would have been 60*s.* whereas his earnings were only 35*s.* He accordingly made an award of 12*s.* 6*d.* a week starting as from February 24, 1938.

In this state of facts the appellants maintained that the respondent had not taken the requisite steps to entitle him to a review of the declaration of liability which he had obtained. The application to review must, they said, be made within six months of the respondent attaining twenty-one whereas it was not made until April 26, 1938. The solicitor's letter of December 8, 1937, was not, in their submission, an application for review. The application required by the section was a formal application to the Court, and the letter was merely an intimation of the action intended to be taken.

Alternatively they argued that, even if the letter was an application to review within the meaning of the section, still the increased sum to be awarded was that which the workman would probably have been earning at the date of the review, and the date of the review was the date of the application, namely, December 8, 1937.

At that date his remuneration as an apprentice would still only have been 30*s*. whereas from his mother he received 35*s*., and consequently he was entitled to the declaration of liability and to no more.

The respondent on his part maintained that the letter of December 8 was an application for review and was made within six months of his attaining twenty-one and that the review took place either at the time as from which the increased payment was directed to begin by the county court judge or at the date at which the county court judge's award was made, and that in either case the difference of 25*s*. in wages was then in existence.

The determination of these questions depends, it is clear, upon the true construction of the wording of s. 11, sub-s. 2, of the Act of 1925 as now amended.

Prima facie the words " application for review " may mean either a request contained in a letter or the formal application prescribed by Form V. of the Workmen's Compensation Rules, 1926, and a workman making either within the prescribed six months would have complied in time with the statutory obligations. But in considering the true meaning of the phrase it is proper to take into consideration the use of the word "application " in the Act generally, and in particular its use in the other parts of the same section.

Not much assistance, however, is to be gained by considering its use in other sections of the Act. Some of them, e.g., s. 19, sub-s. 2 ; ss. 22, 23, sub-s. 7 ; and s. 49, refer in terms to the Court, the Sheriff, or registration, or, as in the case of s. 12, sub-s. 3 (ii.), to a medical referee. Others, such as s. 7, sub-s. 3, and s. 13 are not necessarily confined to applications to the Court, though no doubt they are primarily intended to refer to such an application.

But it is said that if sub-ss. 1 and 2 of s. 11 be read together it is apparent that sub-s. 1 deals with reviews by agreement, and sub-s. 2 deals only with reviews by the Court, and that if review in sub-s. 2 means review by the Court the application to review must bear the same meaning and be used only of an application to the Court.

It is not, I think, necessary for the purpose of the present case to determine whether the word "review" in sub-s. 2 is confined to a review by the Court, since, even if it were, I do not think it follows that application to review means application to the Court or to such other body as has to arbitrate between employer and workman.

The Act was not meant to effect its result by formal methods. Settlement by agreement was the object primarily aimed at. As Lord Halsbury said in *Powell* v. *Main Colliery Co.* (1): "It appears to me that the statute deliberately and designedly "avoided anything like technology. I should judge from "the language and the mode in which the statute has been "enacted that it contemplated what would be a horror to the "mind of a lawyer, namely, that there should not be any "lawyers employed at all, and that the man who was injured "should be able to go himself and say, 'I claim so much,' "and that then he should go to the county court judge and "say, 'Now please to hear this case, because my employer "'will not give me what I have claimed.' It appears to me "that that is the meaning and construction of the whole "statute, and that is what the Legislature intended, and that "is the reason why it avoided any technical phrases. It "strikes one at once that, if anything which to a lawyer's "mind would be in the nature of a technical application or a "technical commencement of the litigation was intended, the "Legislature was competent, and had sufficient knowledge "to say what it meant." It is true that that case was a decision on the use of the word "claim," and "claim," as may be seen by reference to s. 2, sub-s. 3, and ss. 6 and 14 of the Act, is used for informal as well as formal claims, but the case is an authority for the wider proposition that the steps directed by the Act to be taken include applications to the parties as well as formal applications to the Court, and it sets out the principles to be followed where the rights conferred by the Workmen's Compensation Acts have to be considered. What is required is notice to the employer, not an arbitration, and a letter making a definite application for review is, I think, sufficient. Had application to the Court been required it would have been easy to express such a requirement in clear words—as indeed has been done in the form prescribed (Form V. in the Appendix to the Workmen's Compensation Rules, 1926), which speaks of an "application for an arbitration with "respect to a review" and not of an "application to review."

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(1) [1900] A. C. 366, 371.

The view which I have expressed was that taken by the Court of Appeal in *Vickers-Armstrongs* v. *Regan* (1), a decision which they followed in the present case and from which the present petition to your Lordships' House is in substance an appeal. For the reasons I have given that decision is, I think, right in its conclusion and in the grounds on which that conclusion is based.

The second point may, I think, be treated very shortly.

Even if the word "review" were used alone, I should not have thought a review had taken place until the award had been pronounced. But where, as in s. 11 as amended, one finds the words "application to review" and "review" used side by side, those expressions are apparently intended to bear different meanings, and it seems impossible to say that each takes place at the same time.

The application to review, whether it be formally or informally made, is one thing; the review itself is another. For the purpose of the present case it is unnecessary to decide whether the review takes place at the time at which the tribunal gives its award or the time from which that award takes effect. It must be one or the other, and either meaning would enable the respondent to succeed in the present case.

I would dismiss the appeal, and by their undertaking the appellants must in any case bear the costs of this appeal.

Appeal dismissed.

Solicitors for appellants: *Carpenters, for F. G. & H. E. Smith, Bradford.*

Solicitors for respondent: *Smith & Hudson, for Walter West, Grimsby.*

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(1) [1933] 1 K. B. 232.

MAHANT SINGH . . . . APPELLANT; J. C.*

AND 1939

U BA YI . . . . RESPONDENT. March 3.

ON APPEAL FROM THE HIGH COURT AT RANGOON.

Contract—Guarantee—Suit against principal debtor and guarantor—Suit against principal debtor withdrawn—Liability of guarantor—Code of Civil Procedure (India Act V. of 1908), *Order* XXIII., *r.* 1—*Indian Contract Act (IX. of* 1872), *ss.* 2 *(g) and (j),* 134 *and* 139.

Where, in a suit against a principal debtor and his surety, the plaintiff withdraws his suit against the principal debtor under Order XXIII., r. 1, of the Code of Civil Procedure without obtaining leave to institute a fresh suit in respect of the same cause of action against the principal debtor, the plaintiff is precluded from bringing a fresh suit on the debt against the principal debtor, but the principal debt is not released or discharged. The remedy of the surety against the principal debtor is not impaired and his liability is, therefore, not discharged.

Webb v. *Hewitt* (1857) 3 K. & J. 438; *Commercial Bank of Tasmania* v. *Jones* [1893] A. C. 313; *Bateson* v. *Gosling* (1871) L. R. 7 C. P. 9; *Oriental Financial Corp.* v. *Overend Gurney & Co.* (1871) L. R. 7 Ch. 142, 153; *Carter* v. *White* (1883) 25 Ch. D. 666; *Sankana Kalana* v. *Virupakshapa Ganeshapa* (1883) I. L. R. 7 Bom. 146; *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi* (1885) I. L. R. 12 Cal. 330; *Subramania Aiyar* v. *Gopala Aiyer* (1909) I. L. R. 33 Mad. 308; *Dal Muhammad* v. *Sain Das* A. I. R. (1927) Lah. 396; *Murugappa* v. *Munusami* (1920) 38 M. L. J. 131; *Nur Din* v. *Allah Ditta* (1932) I. L. R. 13 Lah. 817; and *Hajarimal* v. *Krishnarav* (1881) I. L. R. 5 Bom. 647, referred to.

Ranjit Singh v. *Naubat* (1902) I. L. R. 24 All. 504 disapproved.

Decree of the High Court reversed.

APPEAL (No. 30 of 1938) from a decree of the High Court in its Appellate Jurisdiction (January 27, 1937), which reversed a decree of the same Court in its Original Jurisdiction (April 9, 1936).

The suit was instituted in the High Court by the appellant, Mahant Singh, against the four trustees of a pagoda and the respondent, U Ba Yi, for moneys due for work done in connection with the pagoda. The works were executed under a contract in writing entered into between Mahant Singh and

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* *Present*: LORD ROMER, LORD PORTER, and SIR GEORGE RANKIN.

Reported by C. Sidney Smith, Esq., Barrister-at-Law.

the four trustees. The four trustees signed the contract and U Ba Yi orally guaranteed the performance of it by them.

In the plaint each of the trustees was named as a defendant, and after their names were added the words "All the above "four are trustees of the Kyaikasan Pagoda, Thisigangyun, "and are sued in that capacity." By his prayer the plaintiff asked for relief against each of the defendants individually.

After the institution of the suit, and before it was heard, the four trustees were removed from office and eight new trustees were appointed in their place.

Mahant Singh then applied for and obtained leave to amend his plaint by substituting the eight new trustees for the original four trustees.

At the hearing, before the merits of the case were entered upon, the trial judge suggested that the liability of the original trustees was a personal one and that no liability attached to the new trustees.

Mahant Singh thereupon applied for the replacement of three of the original trustees (the fourth having died). This application was refused and the trial proceeded.

The trial judge held that, if a man contracted with a trustee, he contracted with him as an individual, and that the case against the new trustees was misconceived, as they were not parties to the contract, and dismissed the suit as against them; but he granted a decree against U Ba Yi for the sum claimed less a small amount not covered by his guarantee.

U Ba Yi appealed and Mahant Singh filed cross-objections.

The Appellate Bench agreed with the trial judge in dismissing the suit as against the new trustees, but held that, in withdrawing the suit against the original trustees, Mahant Singh had discharged the principal debtor in such a way as to render the contract unenforceable and void, and that the liability of the surety was in consequence discharged, and dismissed the suit as against U Ba Yi also.

1939. Feb. 3, 6. *Pritt K.C.* and *de Silva K.C.* for the appellant. The plaintiff did not release the principal debtor; if he did, he did it in such a way that he reserved his rights against the surety. The application to amend the plaint was not an application under Order XXIII., r. 1, of the Code of Civil Procedure. There is nothing in that Order which deals with a case such as this. That shows the application to amend and the amendment were not made under that Order. The plaintiff did not abandon a part of his claim. It is difficult to say he withdrew the suit as against the four trustee defendants. He had a claim against the trustees of the pagoda. He was trying to get money out of the trust fund. If the trustees had to be changed, the names of the defendants had to be changed. Order VI., r. 17, might apply. [Sect. 12 of the Code was referred to.] So long as there is any life in a contract, it does not fall under s. 2 (*j*) of the Contract Act. The contract did not become void by reason of the amendment of the plaint. It was still enforceable. There is nothing in s. 134 of the Contract Act to say you cannot, when releasing the principal debtor, preserve your right against the surety.

[Reference was made to ss. 56 and 65 of the Contract Act and to *Murugappa Mudaliar* v. *Minor Munusami Mudali* (1) and *Nur Din* v. *Allah Ditta.* (2)]

If the conclusion is arrived at that what the plaintiff did affected an alteration of his rights by procedural law, then the question would arise as to whether the plaintiff's error could be cured under s. 151 of the Code: *Sadashio Rao* v. *Umaji.* (3) The case might be remitted with a direction that the original trustee defendants should be again brought on the record.

Dunne K.C. and *R. W. Leach* for the respondent. It is clear that what was asked for in the suit was a personal decree against the trustees. By the amendment of the plaint, the new trustees were substituted for the old and a decree was asked for against them. The plaintiff seems to have been in some confusion as to his rights, but he did not ask for a decree against the trust. Under Order II., r. 2, he was bound to sue for all his remedies in one suit. The suit was withdrawn as against the original trustee defendants. Order XXIII. provides for withdrawal or abandonment and reservation of rights and is applicable. The

(1) (1920) 38 M. L. J. 131.
(2) (1932) I. L. R. 13 Lah. 817.
(3) (1925) 23 Nag. 79.

J. C.
1939
MAHANT SINGH
v.
U BA YI.

legal effect of the withdrawal of the suit as against the original trustees was to discharge them. In the absence of reservation of rights under Order XXIII., r. 1, there is a complete discharge or release of the debtor.

The rights against the debtor are gone. The debt is released. When the debt is released, the surety is released.

Order I., r. 10, and Order VI., r. 17, are not applicable here. When there is a special rule dealing with withdrawal and abandonment, it ought to be applied.

It is said that the plaintiff by not proceeding against the original trustees was merely forbearing to sue and the case was within s. 137 of the Contract Act. We submit the case here is different. Here, by the withdrawal, the contract became unenforceable and void. A contract originally good may become void—for example, a contract on which the right to sue becomes barred by limitation. Sect. 2, sub-s. 9, of the Contract Act covers unlawful contracts and contracts originally void. It does not deal with contracts originally good. When a contract becomes unenforceable and void, the surety will be barred from enforcing his rights. [*Murugappa Mudaliar* v. *Minor Munusami Mudali* (1) was referred to.]

There can be no question of rights being preserved or reserved where a suit is withdrawn without leave to bring a fresh suit under Order XXIII. [Sects. 2 (*j*) and 65 of the Contract Act were referred to.]

Pritt K.C. replied. As regards Order II. the suit was for the whole claim. It cannot be disputed that there was a claim against the trustees. The plaintiff tried to group them. The real error in the Court below, I submit, is that it has mixed up avoidance of an executory contract with a supervening bar. Sect. 2 (*j*) and (*g*) have no application to contracts in which the cause of action has been discharged by agreement or satisfaction in some other way.

March 3. The judgment of their Lordships was delivered by LORD PORTER. The facts in this case can be shortly stated. The plaintiff, who is a building contractor, was employed by the

(1) (1920) 38 M. L. J. 131.

four trustees of a pagoda known as the Kyaikasan Pagoda.

The terms of the employment are set out in a written agreement dated January 1, 1933, and expressed to be made between the Board of the Kyaikasan Pagoda Trustees and the appellant. It is signed by the appellant and each of the trustees.

The respondent was trustee of the estate of a lady called Daw Dwe who had left certain property for charitable purposes. He was not a party to the contract but had orally guaranteed its due performance by the trustees, and in Burma such a guarantee is binding though it is not in writing.

The appellant fulfilled his contract and there was due to him a sum of Rs.26,082–8–6, less, as the learned trial judge found, a sum of Rs.158, which had not been paid. The appellant thereupon instituted the present action on May 21, 1934, in the High Court in its original jurisdiction, claiming the former sum against the four trustees and the respondent.

In the plaint each of the trustees was named as a defendant and after their names were added the words "All the above "four are trustees of the Kyaikasan Pagoda, Thingangyun, and "are sued in that capacity." By his prayer the plaintiff asked for relief against each of the defendants personally and against the respondent in particular as the trustee of Daw Dwe's trust.

The sum awarded by the learned trial judge was obviously due from the respondent and from the trustees personally, but the appellant seems to have thought that his remedy was not against the named trustees but against any one who might from time to time be trustee of the pagoda.

Shortly after the suit had been begun the four trustees were removed from their position as trustees of the pagoda, and eight others were appointed in their place. The appellant thereupon made an interlocutory application asking originally to add the eight new trustees as defendants and ultimately to substitute the new trustees in place of the old. The application was granted on June 20, 1935, and thereupon the names of the four original trustees were struck out and those of the new trustees inserted in their place.

When, however, the case came on for trial, and before the hearing on the merits, the learned trial judge suggested that the liability of the original trustees was a personal one and that no liability attached to the new trustees. Thereupon the appellant on March 24, 1936, applied to replace the names of three out of the four original trustees (the other having died) as defendants. To this application the trial judge refused to accede. He held that he had jurisdiction to grant it under Order I., r. 10, and Order VI., r. 16 (? r. 17), of the Code of Civil Procedure, but he did not think that the appellant should be allowed to change his mind again in the course of the proceedings. The eight trustee defendants were, he thought, entitled to have their case disposed of, more particularly as in his view the appellant would probably be able to pursue his remedies against the original trustees in another suit, though to do so might expose him to a liability for some extra costs.

The suit then proceeded to trial, the claim against the new trustees was dismissed and the respondent found liable as guarantor.

From this decision the respondent appealed to an Appellate Bench, and in that appeal for the first time put forward the contention that the learned judge erred in law in holding him liable. His liability, it was suggested, should have been held to be discharged by the act of the present appellant in forgoing his claim against the original trustees.

The learned judges of the Appellate Bench, whilst rejecting all the other grounds of appeal, held that this contention was well founded, allowed the appeal, and condemned the appellant in costs.

The question argued before their Lordships was whether they were right in so doing.

The grounds upon which in circumstances material to the present case a guarantor may be discharged from his liabilities are well established and indeed were not in issue. A surety is discharged if the creditor, without his consent, either releases the principal debtor or enters into a binding arrangement with him to give him time. In each case the ground of the discharge is that the surety's right to pay the debt at any time and after paying it to sue the principal in the name of the creditor is interfered with.

To hold that in such cases the creditor still retained his right against the surety, and that the surety on his part could still sue the principal debtor, would mean that the release or grant of time was of no effect, inasmuch as the debtor would still be liable at any moment to an action at the suit of the surety.

Where an absolute release is given, there is no room for any reservation of remedies against the surety: see *Webb* v. *Hewitt* (1) and *Commercial Bank of Tasmania* v. *Jones*. (2)

Where, however, the debt has not been actually released, the creditor may reserve his rights by notifying the debtor that he does so, and this reservation is effective not only where the time of payment is postponed but even where the creditor has entered into an agreement not to sue the debtor. In neither case is there any deception of the debtor, since he knows that he is still exposed to a suit at the will of the surety.

In England the striking out of the names of the four original trustees would not have affected the respondent's liability. A fresh action could have been brought against them at any time.

But it is said that the law of Burma differs from the law of England in this respect, and reliance is placed upon the terms of Order XXIII., r. 1, of the Code of Civil Procedure, and upon s. 2 (*g*) and (*j*) and ss. 134 and 139 of the Indian Contract Act. Order XXIII., r. 1, is as follows:—

"(1.) At any time after the institution of a suit the plaintiff "may, as against all or any of the defendants, withdraw his suit "or abandon part of his claim.

"(2.) Where the Court is satisfied—

"(*a*) that a suit must fail by reason of some formal "defect; or

"(*b*) that there are other sufficient grounds for allowing "the plaintiff to institute a fresh suit for the subject-matter "of a suit or part of a claim, it may, on such terms as it "thinks fit, grant the plaintiff permission to withdraw from "such suit or abandon such part of a claim with liberty to

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(1) (1857) 3 K. & J. 438.

(2) [1893] A. C. 313.

"institute a fresh suit in respect of the subject-matter of such "suit or such part of a claim.

"(3.) Where the plaintiff withdraws from a suit or abandons "part of a claim without the permission referred to in sub-"rule (2.) he shall be liable for such costs as the Court may "award and shall be precluded from instituting any fresh "suit in respect of such subject-matter or such part of the "claim."

The sections of the Indian Contract Act are as follows :—

"2.—(*g*) An agreement not enforceable by law is said to be "void.

"2.—(*j*) A contract which ceases to be enforceable by law "becomes void when it ceases to be unenforceable.

"134.—The surety is discharged by any contract between the "creditor and the principal debtor, by which the principal "debtor is released, or by any act or omission of the creditor, "the legal consequence of which is the discharge of the principal "debtor.

"139.—If the creditor does any act which is inconsistent with "the rights of the surety, or omits to do any act which his duty to "the surety requires him to do, and the eventual remedy of the "surety himself against the principal debtor is thereby impaired, "the surety is discharged."

By reason of these provisions the debtor, as the respondent contended, was absolutely released. The appellant indeed contended that he had not proceeded under Order XXIII., r. 1, in applying to substitute the new trustees for the old, but that his application was made under Order I., r. 10, alone. Their Lordships cannot accept this view. The last named rule no doubt authorizes the Court to order the name of a party improperly joined to be struck out and that the names of any person who ought to have been joined be added. But such an order is expressly directed to be made on such terms as may appear to the Court to be just.

If no terms are inserted in the order, then, in their Lordships' view, the effect of withdrawing the suit against some of the defendants is to be ascertained from Order XXIII., r. 1. That Order is not very happily worded, but its meaning is reasonably clear. Under its provisions the Court may give liberty to the applicant to institute a fresh suit after a withdrawal, but if it does not do so, the plaintiff is precluded from instituting a fresh suit in respect of the same subject-matter.

The result, however, is not to release or discharge the debt, but merely to prevent the creditor from suing the principal debtor.

In England an undertaking by the creditor not to sue the principal debtor or a binding agreement to give him time does not operate as a discharge of the surety, providing it is a condition of the undertaking or agreement that the rights of the creditor to sue or receive the money from the surety are reserved: see *Bateson* v. *Gosling* (1) and *Oriental Financial Corp.* v. *Overend Gurney & Co.* (2)

Similarly, a failure to sue the principal debtor until recovery is barred by the statutes of limitation does not operate as a discharge of the surety in England: see *Carter* v. *White.* (3)

The same view prevails in most of the High Courts in India: see *Sankana Kalana* v. *Virupakshapa Ganeshapa* (4); *Krishto Kishori Chowdrain* v. *Radha Romun Munshi* (5); *Subramania Aiyar* v. *Gopala Aiyar* (6); and also *Dal Muhammad* v. *Sain Das.* (7)

It is true that the first two cases were decided in reliance upon the provisions of s. 137 of the Indian Contract Act, which enacts that: "Mere forbearance on the part of the creditor "to sue the principal debtor or to enforce any other remedy "against him, does not in the absence of any provision in "the guarantee to the contrary discharge the surety." But the two later cases base their reasoning also on the broader ground adopted by English law, and hold s. 137 to be merely declaratory of the law and to be enacted only to allay any doubts as to whether the same principles were applicable in India. With these decisions of the other High Courts in India may be contrasted the case of *Ranjit Singh* v. *Naubat* (8), which decides that in spite of the provisions of

(1) (1871) L. R. 7 C. P. 9.
(2) (1871) L. R. 7 Ch. 142, 153.
(3) (1883) 25 Ch. D. 666.
(4) (1883) I. L. R. 7 Bom. 146.
(5) (1885) I. L. R. 12 Cal. 330.
(6) (1910) I. L. R. 33 Mad. 308.
(7) A. I. R. (1927) Lah. 396.
(8) (1902) I. L. R. 24 All. 504.

J. C.
1939
MAHANT SINGH
v.
U BA YI.

s. 137, the creditor's right against the surety is not preserved unless he sues the principal debtor within the period of limitation. Such a decision is inconsistent with the views held by the Courts in England and the majority of the Courts in India. In this conflict, their Lordships prefer the reasoning of the majority.

In any case those decisions deal rather with the question whether the debt was absolutely released, than with the question whether an agreement not to sue or to give time with a reservation of right against the surety, operated as a discharge to him.

The present case is, in their Lordships' opinion, an example of the latter type, and they entertain no doubt that the creditor's rights against the surety were preserved. The appellant's act in continuing to sue the surety though he withdrew his action against the principal debtors was in their view a clear reservation of his rights. Indian authority illustrating this proposition is to be found in *Murugappa* v. *Munusami* (1) and in *Nur Din* v. *Allah Ditta*. (2)

But the respondent argues that, even if those cases are applicable in their own circumstances, or binding in England, they are not applicable in Burma to the present case, because, as he maintains, s. 2 (*j*) of the Indian Contract Act alters the position. In his contention, that section must be read in its widest sense, with the result that in India and Burma any contract in respect of which an action cannot be brought is void, and therefore the plaintiff's right to recover the debt from the original trustees being unenforceable, is void. It follows, he argues, that the principal debtors having been absolutely released the surety is discharged.

If the premises were accurate, the conclusion might follow, even though some of the results would be startling and unexpected. One such result would be that when the period of limitation had run out, not only would the remedy be barred, but the debt would be gone and with it all right to retain anything given as security for the debt, and all right to set off a counter liability against it. This possibility was indeed

(1) (1920) 38 M. L. J. 131. (2) (1932) I. L. R. 13 Lah. 817.

envisaged in *Hajarimal* v. *Krishnarav* (1), but the point was left undecided. A still more startling result, however, is brought about on this construction if s. 2 (*j*) is read with s. 65 of the Indian Contract Act, since in such a case not only would every unenforceable contract become void but each party would be under the obligation of restoring or making compensation for any benefit received, no matter how much had been done towards the performance by either party.

But it is not necessary to adopt a construction leading to such surprising results.

The solution is, in their Lordships' view, to be found in the wording of s. 2 (*j*) itself. Not every unenforceable contract is declared void, but only those unenforceable by law, and those words mean not unenforceable by reason of some procedural regulation, but unenforceable by the substantive law. For example, a contract which was from its inception illegal, such as a contract with an alien enemy, would be avoided by s. 2 (*g*), and one which became illegal in the course of its performance, such as a contract with one who had been an alien friend but later became an alien enemy, would be avoided by s. 2 (*j*). A mere failure to sue within the time specified by the statute of limitations or an inability to sue by reason of the provisions of one of the Orders under the Civil Procedure Code would not cause a contract to become void.

Finally, as their Lordships think, ss. 134 and 139 are merely declaratory of what the law of England was and is.

Sect. 139 only applies where the eventual remedy of the surety against the principal debtor is impaired, and, for the reasons they have given, their Lordships find nothing in the present case which impairs the respondent's remedy against the original trustees.

Under s. 134 the surety is discharged if, and only if, a contract has been entered into by which the debtor is released or if there has been any act or omission on the part of the creditor the legal consequence of which has been to discharge the principal debtor.

If, as in the present case, the only result of striking out the

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(1) (1881) I. L. R. 5 Bom. 647.

J. C.
1939
MAHANT SINGH
v.
U BA YI.

original trustees from the action is to preclude the bringing by the appellant of a fresh suit in respect of the subject-matter against them, and is not to release or discharge the principal debt, then the debt remains a debt though the creditor by reason of a rule of procedure cannot himself bring an action upon it. In such circumstances there is nothing in the section to discharge the liability of the surety.

For these reasons their Lordships hold that the respondent has not been relieved of his liability under the guarantee and will humbly advise His Majesty that the appeal be allowed, the decree of the High Court on its Appellate Side set aside and the decree of the trial judge restored.

The respondent must pay the appellant's costs of the appeal before the Appellate Court and before their Lordships' Board.

Solicitors for the appellant : *Hy. S. L. Polak & Co.*
Solicitors for the respondent : *Gard, Lyell & Co.*

[PRIVY COUNCIL.]

J. C.*
1939
July 21.

MONTREAL TRUST COMPANY AND
ANOTHER . . . . APPELLANTS;

AND

CANADIAN NATIONAL RAILWAY
COMPANY . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Canada (Quebec)—Railway—Contract—Director interested for his own use and benefit—Statutory prohibition—Contract void and of no effect—Railway Act (R. S. C., 1927, c. 170), s. 121.

The prohibition of a contract by statute renders the contract void and of no effect.

Principle in *Macdonald* v. *Riordan* (1899) Q. R. 8 Q. B. 555; 30 S. C. R. Can. 619, approved and applied.

Foster v. *Oxford, etc., Ry. Co.* (1853) 13 C. B. 200, referred to.

The respondents, the Canadian National Railway Company, took from a person who, to their knowledge, was a nominee of one of their directors, a lease of a house to be occupied by their chairman and president as a residence:—

Held, that the lease was a contract with the respondent railway company in which the director was interested "directly or "indirectly for his own use and benefit" within the meaning of s. 121 of the Railway Act of Canada (R. S. C., 1927, c. 170), and was prohibited by the provisions of the section, which applied to the respondent railway company, and the lease was accordingly void and of no effect.

Even assuming that a lease of land was "a contract which "relates to the purchase of land" within the terms of s. 121, the provision of a residence for an official of the railway company could not be a "purchase of land necessary for the railway" so as to bring the case within the words of exception contained in s. 121, for "railway" is defined by the Act in such a way as to restrict its meaning, unless the context otherwise requires, to the track and its physical appurtenances.

Judgment of the Court of King's Bench (Appeal Side) affirmed.

APPEAL (No. 36 of 1939) from a judgment of the Court of King's Bench, Appeal Side, of the Province of Quebec (December 14, 1938), affirming a judgment of the Superior Court for the district of Montreal (September 20, 1935).

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

J. C.
1939
MONTREAL TRUST CO.
v.
CANADIAN NATIONAL RY. CO.

By an agreement, dated September 23, 1929, made between the respondents, the Canadian National Railway Company, and Sir Henry Thornton, he was engaged to continue to serve as president and chairman of the company for a period of five years at a salary of $75,000. Pursuant to a proposal that the president should, in addition to his salary, be provided with free residential quarters, the executive committee of the directors passed a resolution, approved by the board of directors on September 23, 1929, whereby it was resolved that the executive Committee should lease a suitable and properly equipped residence for that purpose. In due course one Ernest Decary, who was a director of the respondent railway company, was asked by his co-directors whether he could arrange the financing of the purchase of a house, No. 1415, Pine Avenue, Montreal (where Sir Henry Thornton was in fact then living), and which belonged to one Beardmore, so as to enable the respondent company, who only wished to rent and not to purchase a property, to take a lease of the house from the purchaser. Ultimately Decary arranged with the manager of the appellants, the Montreal Trust Company, that that company would advance the money necessary to purchase the property on certain terms. Meanwhile, Beardmore and Sir Henry Thornton had already come to terms under which Beardmore agreed to accept and Sir Henry Thornton agreed to pay $175,000 for the house and $10,000 for sundry furnishings therein. The benefit of that contract was on July 9, 1930, at the written request of Decary, assigned by Sir Henry Thornton to one Séguin, a notary in the employ of Decary's firm, who was described by Decary in the request as "my "nominee." By a resolution, approved by the directors of the respondent railway company, the executive committee, on June 16, 1930, resolved to rent the property from Séguin for ten years; and on August 8, 1930, a lease of the house was executed by Séguin to the railway company for the term of ten years from August 1, 1930, on certain terms. Séguin's rights under the lease were transferred to the appellant trust company as part security for their advance.

Sir Henry Thornton died in March, 1933, and on April 27, 1933, the legal advisers of the railway company wrote to Séguin alleging that "the lease executed on the 8th August, "1930, ... between the railway and yourself—acting for "the benefit of Mr. Ernest Decary—is a nullity." That allegation was based on s. 121 of the Railway Act (R. S. C., 1927, c. 170), which enacts that: "No person who is a director "of the company shall enter into or be directly or indirectly "for his own use and benefit interested in any contract with the "company other than a contract which relates to the purchase "of land necessary for the railway, ..." In the action brought by the appellants as transferees of Séguin's rights under the lease, they claimed the instalments of rent due on May 1, 1933, and August 1, 1933. Séguin was summoned as mis-en-cause in the superior Court.

The trial judge (de Lorimier J.) and, on appeal, the Court of King's Bench, Appeal Side (Letourneau, Bond, Galipeault, St. Jacques and Barclay JJ.), were of opinion that by reason of the part played by Decary in relation to the lease and the purchase of the property, s. 121 operated to make the lease a nullity and of no effect, and the action was dismissed. The Trust Company now appealed.

1939. July 6, 7. *Cyril Radcliffe K.C.* and *W. F. Chipman K.C.* for the appellants. The question is whether the lease, though not itself a contract between the director, Decary, and the respondent railway company, was one in which he was interested, directly or indirectly, for his own use and benefit within the meaning of s. 121 of the Railway Act. If there is a breach of s. 121 there is a penalty section—s. 444; there is clearly a statutory prohibition against the director being allowed to get his interest, but s. 121 does not in terms invalidate the contract by the director, and art. 14 of the Quebec Civil Code, which provides that "Prohibitive laws "import nullity, although such nullity be not therein "expressed" is not applicable to the construction of a Dominion Act. The Court of Appeal below were of opinion that this was Decary's lease, that it was prohibited under

J. C.
1939
MONTREAL TRUST CO.
v.
CANADIAN NATIONAL RY. CO.

s. 121, and, invoking art. 14 of the Quebec Civil Code, they said that it was therefore illegal, null and void. It is submitted that that is wrong. In view of the facts that the formal resolution of the company of June 16, 1930, was to the effect that they would take a lease from Séguin, that Séguin was the purchaser from Beardmore, and that the parties appeared before a notary and registered themselves before him as parties to the transaction, it is not possible, it is submitted, to take the view that Séguin was nothing but an alias for Decary; he must be regarded as the person who formed this consensus which forms the contract with the Canadian National Railway, and his rights were something arising by independent arrangement between himself and Decary.

Nor is there any ground in this case for the suggestion that Séguin was acting as agent for Decary, and thereby making a contract which, by virtue of the law of agency, became the contract of Decary with the railway company; there was nothing for Decary to be principal about. On the evidence the company were concerned, as between themselves and Decary, that he should find or provide the finance for the transaction under which the company were to get what they wanted—a lease only of the land. It is only the parties to a contract under the Civil Code of Quebec who can be bound by it: arts. 1023, 1701 and 1716. It is not possible, on the facts of this case, to look at the deed of sale and say that the person who is called Séguin is really Decary. Further, the lease is not within the proper meaning of the word "contract" as used in s. 121. In any event, the effect of s. 121 is not to avoid the transaction which is the contract, but is only to avoid the interest which the director has in it. It is plain that there must be cases under s. 121 which cannot operate to avoid the contract itself. The Court of Appeal held itself bound by the decision in *Macdonald* v. *Riordan* (1); but it is submitted that the facts in that case have no relation to those in the present case. The statutory position on s. 121 in Quebec is the same as the common law position in *Foster* v.

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(1) (1899) Q. R. 8 Q. B. 555, 568, 572, 574; 30 S. C. R. Can. 619.

J. C.
1939
Montreal Trust Co.
v.
Canadian National Ry. Co.

Oxford, etc., Ry. Co. (1), which was a case under provisions of the Companies Clauses Consolidation Act, 1845, which are substantially the same as the section now in question. In *Foster's* case (1) the director was an actual contracting party, and that case is therefore stronger than the present one, where Decary was not a contracting party, but was a person interested in the contract. [Reference was also made to *Kaye* v. *Croydon Tramways Co.* (2)]

With regard to whether the transaction was a "purchase "of land necessary for the railway" within the meaning of the exception in s. 121, the first question is whether it is a purchase when an interest in land is acquired by lease for value. Under s. 162 (*c*), of the Railway Act, R. S. C., 1927, c. 170, the company may "purchase, take and hold" land, and it is submitted that that is a clear statutory power in the railway to hold lands on lease. Secondly, is this properly described as "land necessary for the railway"? It is submitted that it is; it is a question of degree. The bona fides of the directors is not in question, and they passed a resolution that the railway company needed a house for the president.

W. F. Chipman K.C. followed. Apparently the plan was that some individual would purchase a suitable property and lease it to the respondent railway company on terms which would enable the purchaser to borrow the whole amount of the purchase price. It was a perfectly legal and intra vires plan; does it become invalid because that "some individual" is found at the request of the board of the railway company by Decary, one of the members of the board; and can the contract be set aside as really a contract with Decary although he is not impleaded? Can it be set aside although the remainder of the plan is not in any way interfered with? If the plan is one, it can only stand or fall as a whole. The respondents can only succeed in getting the contract with Séguin set aside if at the same time they can restore the appellants to the position in which they were before they were invited to enter into the plan. The position of the

(1) (1853) 13 C. B. 200.
(2) [1898] 1 Ch. 358, 367.

appellants is very strong in equity; the contract must be an absolute nullity if they are to fail. [Reference was made to *In re Express Engineering Works, Ld.* (1), and *Montreal City* v. *Montreal Harbour Commissioners.* (2)] There is no general maxim in Quebec civil law that a man may not put himself in a position where his interests conflict with his duty: arts. 984, 985, 989, 1483, 1484, 1706, Quebec Civil Code. If Séguin was accountable to Decary, he, in turn, was accountable to the railway company; he acted as, and treated himself as, a person asked to do something for the railway company. In any event, the railway company had adopted the lease and could not now repudiate it.

L. S. St. Laurent K.C. and *H. E. O'Donnell K.C.* for the respondents were not called upon to argue.

July 21. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN. In this case the Montreal Trust Company and one Séguin appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, which affirmed a judgment of the Superior Court. The judgment declared a lease by Séguin to the Canadian National Railway Company to be illegal and void, and dismissed with costs an action for rent thereunder brought by the Montreal Trust Company as transferee of Séguin's rights under the lease. Séguin was summoned as mis-en-cause.

The relevant facts which led up to the action must be stated, the Canadian National Railway Company being referred to as the railway company, and the Montreal Trust Company being referred to as the trust company.

The railway company is a company incorporated by a Dominion statute, 9 & 10 Geo. 5, c. 13, now represented by R. S. C., 1927, c. 172. It has no capital stock or shareholders. Its corporators are its directors, who (from five to fifteen in number) are all chosen by the Governor-General in Council. It is subject to the provisions of the Railway Act of Canada (R. S. C., 1927, c. 170), excepting those provisions which are inconsistent with its own Act.

(1) [1920] 1 Ch. 466, 471.

(2) [1926] A. C. 299.

In September, 1929, the president and chairman of the railway company was Sir Henry Thornton. He had filled those offices for some seven years. He was then serving in those capacities under an agreement with the railway company, dated September 2, 1925, at a salary of $65,000 a year. That agreement was due to expire on October 4, 1930. He was living, at his own expense, in a house, 1415, Pine Avenue, in the City of Montreal, which he leased from a Mr. Beardmore at a rent of $6,000. His tenure was, however, precarious, because Mr. Beardmore was anxious to sell the house, and the lease contained a clause enabling Mr. Beardmore to terminate the lease on three months' notice.

By an agreement dated September 23, 1929, and made between the railway company and Sir Henry Thornton, he was engaged to continue to serve as president and chairman for a period of five years from October 4, 1928, and thereafter from year to year, determinable by either party on 12 months' notice, at a salary of $75,000, without any extra fees or remuneration of any description; and the agreement of September 2, 1925, was cancelled as from October 4, 1928. Apparently out of abundant caution, Sir Henry Thornton obtained an agreement (dated October 25, 1929) from the Crown to the same effect, the salary of $75,000 thereunder being expressed to be payable less the remuneration receivable under his agreement with the railway company.

For some reason, not immediately apparent, a proposal was set on foot that the president should (in addition to his salary of $75,000) be provided with free residential quarters, and on September 17, 1929, the executive committee of the directors passed a resolution (which was approved by the board of directors on September 23, 1929), in the following terms: "Whereas in the opinion of the executive committee "a suitable residence in Montreal for the chairman and "president of the company is essential for the proper conduct "of the company's business, it was unanimously resolved "that the executive committee should undertake to lease a "suitable and properly equipped residence for the use of the "chairman and president of the company under such terms and "conditions as the committee may subsequently deem "proper."

Steps were then taken to provide the residence, the most obvious choice, if it were possible, being the house in Pine Avenue which was, and had for some time past been, Sir Henry's home. A difficulty, however, existed in the fact that Mr. Beardmore would not lease but would only sell, while the railway company would not buy but would only rent. At this point Mr. Decary becomes prominent in the story. He was president of the Title Guarantee and Trust Corporation, and a director of the railway company. He was also the head of a firm of notaries, Decary, Barlow and Joron. He was asked by his co-directors whether he could arrange the financing of a purchase of the Pine Avenue house. He said that the Title Guarantee and Trust Corporation would not finance it; but that he would try to get it financed elsewhere. Ultimately he did arrange with a Mr. Donaldson, the manager of the trust company, that the trust company would advance the money necessary to purchase the property on the terms contained in the following letters:—

(1.) Letter. Decary to Donaldson. June 24, 1930.

"Referring to our conversation of the other day in con-"nection with the Beardmore property on Pine Avenue, I, "or my nominee subject to my personal guarantee, will "purchase the above property for $185,000.00 cash, the "property subsequently to be rented to the Canadian National "Railways for ten years, at a price representing 8½ per cent. "per year, net, outside of taxes of any kind, repairs and "improvements.

"You will make a loan for this amount of $185,000.00 for "ten years, at 6½ per cent., the difference between the amount "of interest paid and 8½ per cent. to be applied as a sinking "fund on the amount of the loan. Your Company will be "given a first mortgage on the property and an absolute transfer "of the Canadian National lease as guarantee for the loan.

"We should be in a position to complete this transaction "during the first days of the month of July. Will you please "advise if this is convenient to you, and oblige."

J. C.
1939
MONTREAL TRUST CO.
v.
CANADIAN NATIONAL RY. CO.

(2.) Letter. Donaldson to Decary. June 25, 1930.

"I have your letter of the 24th instant, in connection with "the Beardmore property on Pine Avenue. The arrangement "as outlined by you is quite satisfactory to us and we are "prepared to make the loan for the amount stated, subject "to satisfactory title."

Meanwhile Mr. Beardmore and Sir Henry Thornton had already come to terms, under which Mr. Beardmore agreed to accept and Sir Henry agreed to pay $175,000 for the house and $10,000 for sundry furnishings therein; and the benefit of this contract was on July 9, 1930, at the request of Mr. Decary, assigned by Sir Henry Thornton to the mis-en-cause, Séguin. Séguin was described by Mr. Decary in this request, which was made by letter dated July 4, 1930, as "my "nominee." Séguin is himself a notary, and is in the employ of Mr. Decary's firm.

On June 16, 1930, the executive committee had passed a resolution which was worded thus:—

"Resolved that the company rent from George H. Séguin "for a term of ten (10) years, commencing on the first day of "August, Nineteen hundred and thirty (1930), and expiring "on the first day of July, Nineteen hundred and forty (1940), "that certain house bearing No. 1415, Pine Avenue West, "in the City of Montreal, for an annual rental of fifteen "thousand seven hundred and twenty-five dollars ($15,725) "payable quarterly on the first days of February, May, August, "and November of each year, the first payment to become "due on the first day of November next (1930) and subject "to the following conditions on the part of the company, "namely:—

"To keep the house in good order of repairs during the "entire term of the lease;

"To use the premises as a private residence only, and for "no other purposes;

"To pay all taxes and assessments, general or special, or "of any nature whatsoever which may be imposed on said "property during the term of the lease."

The sum of $15,725 is 8½ per cent. on the total sum payable to Mr. Beardmore for the house and furniture. This resolution was approved by the directors of the railway company on August 19, 1930.

On August 8, 1930, three notarial documents were executed and subsequently registered—namely, (1.) a deed of sale by Mr. Beardmore to Séguin of the house and its contents and furnishings, the price being stated to be $175,000 for the immovable properties and $10,000 for the contents and furnishings of the house; (2.) a lease by Séguin to the railway company for the term of ten years from August 1, 1930, of the house in consideration of $157,250, payable by forty quarterly instalments as therein mentioned; and (3.) a deed of loan between the trust company and Séguin by which the trust company lent $185,000 to Séguin, and Séguin bound himself to repay the loan on August 1, 1940, to pay interest at 6½ per cent. in the meantime, and also to reduce the principal by annual repayments of 2 per cent. of the amount of the loan. As security, Séguin hypothecated in favour of the trust company the house in Pine Avenue, and transferred to it his rights under the lease to the railway company.

Subsequently Séguin, as "owner" of the house, entered into an agreement to make certain repairs thereto at a cost not to exceed $50,000. This fact need only be stated for the purpose of explaining the reference to that sum in the following letter. On November 6, 1930, Mr. Decary wrote a letter to Sir Henry Thornton containing the following passage: "As you have asked me also, I hereby agree on behalf of the "owner of property 1415, Pine Avenue, which you now "occupy, to sell you this property at any time during the "term of its lease to Canadian National Railways for the "sum remaining due to us on the advances of $185,000.00 and "$50,000.00. In order, however, not to encumber my estate "in any way this option would have to be exercised within "six months following my death should I die before the "expiry of your lease."

On November 20, 1930, Sir Henry Thornton (by letter of that date) informed the Minister of Railways of this option to purchase, and stated that it was "of course assignable to "any nominee of my own."

The rest of the story is soon told. Sir Henry Thornton died in March, 1933; and on April 27, 1933, the legal advisers of the railway company wrote to Séguin alleging that " the lease "executed on the 8th August, 1930, ... between the railway "and yourself—acting for the benefit of Mr. Ernest Decary— "is a nullity." The present action was commenced on October 13, 1933, claiming payment of the instalments of rent due on May 1, 1933, and August 1, 1933, respectively.

The point of the case can now be stated. It is claimed by the railway company that the lease is a nullity by reason of the provision contained in s. 121 of the Railway Act (R. S. C., c. 170) which enacts: "No person who is a director of the "company shall enter into, or be directly or indirectly, for "his own use and benefit, interested in any contract with the "company other than a contract which relates to the purchase "of land necessary for the railway, nor shall any such person "be or become a partner of or surety for any contractor with "the company."

It is said that by reason of the part played by Mr. Decary in relation to the lease and the purchase of the property, the section operates to make the lease a nullity and of no effect.

The trial judge and the Appeal Court have both taken this view, but as the result of different reasoning. Their Lordships also are of opinion that the action was rightly dismissed by reason of the section; but they prefer to base their view on a branch of the section different from that which found favour with the judges of the Court of King's Bench.

Their Lordships are not concerned with any question but the validity of the lease. No question can arise in this action (to which Mr. Beardmore is not a party) in relation to the purchase from him and the conveyance by him to Séguin, or in relation to the hypothec by Séguin to the trust company. Indeed, by no stretch of the imagination can either transaction come within the section; they cannot in any sense be described as contracts with the railway company.

The case is otherwise with regard to the lease. To that document the railway company is a party, and by that document it enters into contractual relationship with Séguin. But Séguin was admittedly, and to the knowledge of the railway company, merely the nominee of Mr. Decary. Subject to the rights of the trust company under the deed of hypothec, Séguin would have to account to Mr. Decary for the rent payable by the railway company under the lease. On the other hand, Mr. Decary would be bound to indemnify Séguin and keep him harmless from all liability imposed upon him as a lessor by virtue of the lease. In these circumstances their Lordships feel no doubt that the lease was a contract with the railway company in which Mr. Decary was directly or indirectly interested. So far the case falls directly within the words of the section.

The appellants, however, contended that the whole transaction was not a profitable one, that Mr. Decary only acted in the matter at the instance of the railway company, and with no expectation of profit, that Sir Henry Thornton's option to purchase existed for the benefit of the Railway Company, and that in these circumstances it could not be said that Mr. Decary, if interested in a contract with the railway company, was interested therein " for his own use "and benefit." Their Lordships cannot accede to this contention. Mr. Decary no doubt acted as he did at the request of the railway company, and in order to achieve the result which was desired, namely, that a purchase by the railway company should be avoided and a lease from a purchaser should be obtained. This result was achieved by Mr. Decary finding a purchaser in the shape of his nominee, who granted the desired lease, with the inevitable consequence that Mr. Decary became interested, and for his own use and benefit. Nor can the fact, if it be the fact, that the transaction is deemed unprofitable affect the question. The lessor was Mr. Decary's nominee, and Mr. Decary represented no one but himself in procuring his nominee first to become the registered owner of the property, and then to execute the lease. Mr. Decary's interest in the lease was an interest which enured for his own use and benefit, and for the use and benefit of no one else. Nor can the existence of an option to purchase affect the question, for unless and until the option is exercised the position remains unchanged.

It was further contended by the appellants that the case fell within the words of exception contained in the section, namely, " other than a contract which relates to the purchase "of land necessary for the railway." Their Lordships will assume, without in any way indicating an opinion upon the point, that a lease of land is a contract which relates to the purchase of land. They are, however, of opinion that the land here in question was not "necessary for the railway" within the meaning of the section. " Railway " is defined by the Act (s. 2, sub-s. 21) in such a way as to restrict its meaning, unless the context otherwise requires, to the track and its physical appurtenances. Their Lordships are unable to conceive how providing a residence for an official of the company could be a purchase of land necessary for the railway as defined by the Act.

The result is that the case falls exactly within that branch of the section which prohibits a director from being interested in any contract with the company. Their Lordships prefer to base their decision upon that branch of the section, as they feel that there might well be a difficulty in saying that the lease in this case, in fact entered into by Séguin, though chosen for that purpose by Mr. Decary, was a contract "entered into " by Mr. Decary.

The question then remains, what is the effect of the prohibition contained in the section ? It was contended that the effect was not to invalidate the contract, but only to avoid the director's interest in it, and to give rise to penalties under s. 444. It was said that the effect produced by s. 121 was no different from that produced by ss. 85 and 86 of our Companies Clauses Consolidation Act, 1845, as exemplified by *Foster* v. *Oxford, etc., Ry. Co.* (1), in which it was held that a contract between the company and a director was not avoided. The language of the two enactments is not, however, comparable, and the Courts in Quebec decided that the contract was a

(1) 13 C. B. 200.

nullity, being bound, as they said, by the decision of the Supreme Court of Canada in *Macdonald* v. *Riordan* (1). That case was concerned with s. 19, sub-s. 16, of the Consolidated Railway Act, 1879, which was framed thus: "No person "holding any office, place or employment in or being concerned "or interested in any contracts under or with the company, shall "be capable of being chosen a director, or of holding the "office of director, nor shall any person being a director of the "company enter into, or be directly or indirectly, for his own "use and benefit, interested in any contract with the company, "not relating to the purchase of land necessary for the railway, "or be or become a partner of any contractor with the "company."

In that case a director of a railway company had, by agreements with the firm of contractors who were constructing the company's line, become entitled to a share of the payments made by the railway company to the contractors. He brought an action to recover his share against the contractors, who pleaded that the agreements were null and void because they were prohibited by s. 19, sub-s. 16, of the above-mentioned Act. The trial judge allowed the claim, holding that making such contracts was merely a punishable offence which did not affect the civil rights of the parties. That judgment was reversed by the Court of Review (Montreal) on the ground that the contracts were prohibited by law and therefore void. The judgment of the Court of Review was affirmed, on appeal, by the Court of Queen's Bench for Lower Canada (Appeal Side), whose judgment was in turn affirmed by the Supreme Court of Canada, and for the reasons given in the Court of Queen's Bench. It is sufficient, their Lordships think, to quote a passage from the judgment of Wurteli J. in the Court of Queen's Bench. After referring to the contracts which sub-s. 16 of s. 19 prohibited, he continued (2)—". . . . and the "effect of such a prohibition is to render such a contract "illegal and void, although the statute itself does not state that "it is so and only imposes a penalty on the offender. Our

(1) (1899) Q. R. 8 Q. B. 555; 30 S. C. R. (Can) 619.
(2) (1899) Q. R. 8 Q. B. 574.

"civil code, in article 14, declares that prohibitive laws import "nullity although such nullity is not expressed. . . .

". . . . In the present case the contracts were entered into "in transgression of the provisions of the Consolidated Railway "Act of 1879 which prohibited the appellant from entering into "such contracts and which declared his act in becoming a "party to them a misdemeanour and they are therefore void "and without effect."

It is true that the contracts there in question were not contracts with the company, but contracts which made the director interested in a contract with the company. Their Lordships, however, agree with the principle there laid down, that prohibition of a contract by statute renders the contract void and of no effect.

Their Lordships are of opinion that in the present case the railway company, in taking a lease in which to its knowledge one of its directors was interested, made a contract prohibited by s. 121. That contract is accordingly void and of no effect; and the action to recover rent thereunder was rightly dismissed.

This appeal should accordingly be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Lawrence Jones & Co.*

Solicitors for respondents: *Freshfields, Leese & Munns.*

END OF VOL. AND OF APPELLATE SERIES FOR 1939.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1939, will be as follows :—

In the First Series,
[1939] 1 Ch.

In the Second Series,
[1939] 1 K. B. [1939] 2 K. B. [1939] P.

In the Third Series,
[1939] A. C.

INDEX.

ACCIDENT—Act within scope of employment—Negligence of workman **71**
See WORKMEN'S COMPENSATION.

AGGREGATION—Proceeds of life insurance policy and assessment of Estate Duty - - - - - - **207**
See REVENUE.

AIR CARRIAGE—Convention of Warsaw—"International carriage" - **332**
See CARRIER.

ALBERTA - - - - - - - **117**
See CANADA (ALBERTA).

ALTERATION OF AREAS—Adjustment of financial relations - - - **48**
See LOCAL GOVERNMENT.

APPLICATION FOR REVIEW — Of weekly payment to infant workman — Letter to employer a sufficient application - - - - **590**
See WORKMEN'S COMPENSATION **2.**

AUSTRALIA—*Insurance—Wool—Consigned by owner to brokers for sale—Destroyed by fire in brokers' store — Brokers' insurable interest—Full value recoverable from insurer — Apportionment between owner and brokers according to respective interests—Brokers not entitled to retain prospective profits and charges.*
Judgment of the High Court of Australia reversed. MAURICE *v.* GOLDSBROUGH MORT & Co. - - - - - - - **J. C. 452**

BANK—Bill taxing banks operating in Alberta—Whether ultra vires **117**
See CANADA (ALBERTA).

BILL OF LADING—Proper law of contract - - - - - - **277**
See CONTRACT **3.**

BILL OF LADING—*continued.*

—— Subject to Canadian Water Carriage of Goods Act, 1910 - - **397**
See SHIPPING.

BOUNDARIES—Alteration of - - **48**
See LOCAL GOVERNMENT.

BRITISH NORTH AMERICA ACT, 1867—Distribution of Dominion and Provincial legislative powers - **117, 468**
See CANADA (ALBERTA AND ONTARIO).

BROKER—Insurable interest in goods held for sale—Goods destroyed by fire—Broker not entitled to retain prospective profits and charges - **452**
See AUSTRALIA.

BUDDHIST (CHINESE) — Succession law applicable - - - - **527**
See BURMA.

BURMA—*Succession to estate of Chinese Buddhist—Burmese Buddhist law applicable —Chinese customary law — Burma Laws Act (XIII. of* 1898) *s.* 13, *sub-ss.* 1, 2, 3 —*Construction.*
Decree of the High Court at Rangoon reversed. TAN MA SHWE ZIN *v.* KHOO SOO CHONG - - - - - - **J. C. 527**

CANADA—Water Carriage of Goods Act, 1910—Insufficient bunkers in vessel on sailing—Failure to exercise "due "diligence to make the vessel in "all respects seaworthy" - **397**
See SHIPPING.

CANADA (ALBERTA) — *Bill taxing Banks operating in Province—Object and effect of legislation—Not in true sense taxation to raise revenue for Provincial purposes—Part of legislative plan to prevent operation of banking institutions — Ultra vires — British North America Act,* 1867 (30 *&* 31 *Vict.*

CANADA (ALBERTA)—*continued.*

c. 3), *s.* 91 (15.), (16.) ; *s.* 92 (2.)—*Bill entitled "An Act Respecting the Taxation of Banks," of the Alberta Legislature, third session,* 1937.
Judgment of the Supreme Court of Canada [1938] Can. S. C. R. 100 affirmed. ATT.-GEN. FOR ALBERTA *v.* ATT.-GEN. FOR CANADA **J. C. 117**

2. —— **(ONTARIO)** — *Municipalities—Default in debenture issue—Financial difficulties—Statutory amalgamation of four municipalities—Scheme to meet debenture and other indebtedness—Validity of Amalgamating Acts and scheme—Relative to municipal institutions in the Province—Within legislative competence of Provincial Legislature — City of Windsor (Amalgamation) Act, S. O.,* 1935, *c.* 74—*City of Windsor (Amalgamation) Amendment Act, S. O.,* 1936, *c.* 66—*Ontario Municipal Board Act, S. O.,* 1932, *c.* 27, *and* 1935, *c.* 51, *Part VI.—Department of Municipal Affairs Act, S. O.,* 1935, *c.* 16, *Part III.—British North America Act,* 1867 (30 & 31 *Vict. c.* 3), *s.* 91 (19.), (21.) ; *s.* 92 (8.).
Judgment of the Court of Appeal for Ontario [1938] O. R. (C. A.) 324 ; [1938] 3 D. L. R. 212, affirmed. LADORE *v.* BENNETT **J. C. 468**

3. —— **(QUEBEC)** — *Railway — Contract—Director interested for his own use and benefit—Statutory prohibition—Contract void and of no effect—Railway Act (R. S. C.,* 1927, *c.* 170), *s.* 121.
Judgment of the Court of King's Bench (Appeal Side) affirmed. MONTREAL TRUST CO. *v.* CANADIAN NATIONAL RAILWAY CO. **J. C. 613**

CARRIER — *Air carriage — Convention of Warsaw—" International carriage " — " High "Contracting Parties "—Carriage by Air Act,* 1932 (22 & 23 *Geo.* 5, *c.* 36), *s.* 1, *sub-s.* 2 ; *Sch.* 1.
Decision of the Court of Appeal (March 3, 1938) reversed. PHILIPPSON *v.* IMPERIAL AIRWAYS, LD. - - - **H. L. (E.) 332**

CASES :—

—— *Aeneas, The* [1935] P. 128.
Overruled - - - **H. L. (E.) 94**

—— *Arantzazu Mendi, The* [1939] P. 37.
Affirmed - - **H. L. (E.) 256**

—— *Ashton, In re. Westminster Bank* v. *Farley* [1938] Ch. 482.
Affirmed - - - **H. L. (E.) 430**

—— *Attorney-General* v. *Pearson* [1924] 2 K. B. 375.
Approved and applied. TENNANT *v.* LORD ADVOCATE - **H. L. (Sc.) 207**

—— *Att.-Gen. for Alberta* v. *Att.-Gen. for Canada* [1938] Can. S. C. R. 100.
Affirmed - - - - **J. C. 117**

CASES—*continued.*

—— *Bank of Toronto* v. *Lambe* (1882) 12 App. Cas. 575, 587.
Dictum discussed and explained **J. C. 117**

—— *Bateson* v. *Gosling* (1871) L. R. 7 C. P. 9.
Referred to. MAHANT SINGH *v.* U BA YI - - - - **J. C. 601**

—— *Benefices of Great Massingham and Little Massingham, In re* [1931] A. C. 328.
Referred to. UNION OF THE BENEFICES OF WESTOE AND SOUTH SHIELDS, ST. HILDA, *In re* **J. C. 269**

—— *Bensaude* v. *Thames and Mersey Marine Insurance Co.* [1897] A. C. 609.
Distinguished. ROBERTSON *v.* PETROS M. NOMIKOS, LD. **H. L. (E.) 371**

—— *British Bank for Foreign Trade* v. *Russian Commercial and Industrial Bank* (1921) 38 Times L. R. 65.
Referred to - - - **J. C. 145**

—— *Carter* v. *White* (1883) 25 Ch. D. 666.
Referred to. MAHANT SINGH *v.* U BA YI - - - - **J. C. 601**

—— *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* [1914] A. C. 569, 576.
Referred to. VYRICHERLA NARAYANA GAJAPATIRAJU *v.* REVENUE DIVISIONAL OFFICER, VIZAGAPATAM **J. C. 302**

—— *Chesterman's Trusts, In re* [1923] 2 Ch. 466.
Applied - - - **J. C. 145**

—— *Commercial Bank of Tasmania* v. *Jones* [1893] A. C. 313.
Referred to. MAHANT SINGH *v.* U BA YI - - - - **J. C. 601**

—— *Corea* v. *Appuhamy* [1912] A. C. 230.
Referred to - - - **J. C. 136**

—— *Dal Muhammad* v. *Sain Das* A. I. R. (1927) Lah 396.
Referred to. MAHANT SINGH *v.* U BA YI - - - - **J. C. 601**

—— *Dobell* v. *Steamship Rossmore Co.* [1895] 2 Q. B. 408.
Referred to. VITA FOOD PRODUCTS, INC. *v.* UNUS SHIPPING CO. **J. C. 277**

—— *Ebsworth* v. *Alliance Marine Insurance Co.* L. R. 8 C. P. 596, at pp. 628, 637.
Observations discussed. MAURICE *v.* GOLDSBROUGH MORT & CO. **J. C. 452**

CASES—*continued.*

—— *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co., Ld.* [1924] A. C. 522, 564.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Evans, Sons & Co.* v. *Cunard Steamship Co.* (1902) 18 Times L. R. 374.
Discussed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co. **H. L. (E.) 562**

—— *Feist* v. *Société Intercommunale Belge d'Electricité* [1934] A. C. 161.
Applied. New Brunswick Railway Co. *v.* British and French Trust Corporation **H. L. (E.) 1**

—— *Foster* v. *Oxford, Etc., Ry. Co.* (1853) 13 C. B. 200.
Referred to. Montreal Trust Co. *v.* Canadian National Ry. Co. **J. C. 613**

—— *Fraser* v. *Fraserville (City of)* [1917] A. C. 187, 194.
Referred to. Vyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer, Vizagapatam **J. C. 302**

—— *Frenkel* v. *Mac Andrews & Co.* [1929] A. C. 545.
Discussed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co. **H. L. (E.) 562**

—— *Glass* v. *Inland Revenue* 1915 S. C. 449.
Referred to Vyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer, Vizagapatam **J. C. 302**

—— *Glynn* v. *Margetson & Co.* [1893] A. C. 351.
Discussed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co. **H. L. (E.) 562**

—— *Gough and the Aspatria, Silloth and District Joint Water Board, In re* [1904] 1 K. B. 417.
Referred to. Vyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer, Vizagapatam **J. C. 302**

—— *Grein* v. *Imperial Airways, Ld.* [1937] 1 K. B. 50.
Not agreed with. Philippson *v.* Imperial Airways, Ld. **H. L. (E.) 332**

—— *Hajarimal* v. *Krishnarav* (1881) I. L. R. 5 B. 647.
Referred to. Mahant Singh *v.* U Ba Yi - - - **J. C. 601**

—— *Haliartus, The* (1928) 31 Ll. L. Rep. 185, 189.
View expressed by Hill J. dissented from. Heranger (Owners) *v.* Diamond (Owners) **H. L. (E.) 94**

—— *Harland & Wolff* v. *Burns* 1931 S. C. 722.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Hoystead* v. *Commissioner of Taxation* [1926] A. C. 155, 170.
Quære as to effect of, discussed. New Brunswick Railway Co. *v.* British and French Trust Corporation - - - **H. L. (E.) 1**

—— *Industrie, The* - - [1894] P. 58.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Inland Revenue Commissioners* v. *Clay* [1914] 1 K. B. 339, 348.
Referred to. Vyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer, Vizagapatam **J. C. 302**

—— *Irving* v. *Commercial Banking Co. of Sydney* (1897) 19 N. S. W. R. Eq. 54.
Approved. Wright *v.* New Zealand Farmers Co-Operative Association of Canterbury - **J. C. 439**

—— *Jacobs, Marcus & Co.* v. *Crédit Lyonnais* (1884) 12 Q. B. D. 589.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Kearney* v. *Whitehaven Colliery Co.* [1893] 1 Q. B. 700.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Krishto Kishori Chowdhrain* v. *Radha Romun Munshi* (1885) I. L. R. 12 C. 330.
Referred to. Mahant Singh *v.* U Ba Yi - - - **J. C. 601**

—— *Ladore* v. *Bennett* [1938] O. R. (C. A.) 324.
Affirmed - - - - **J. C. 468**

—— *Leduc & Co.* v. *Ward* (1888) 20 Q. B. D. 475.
Discussed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co. **H. L. (E.) 562**

—— *Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.* (1889) 129 U. S. 397.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

CASES—*continued.*

—— *Liverpool Borough Bank* v. *Turner* (1860) 2 De G. F. & J. 502.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Lucas and Chesterfield Gas and Water Board* [1909] 1 K. B. 16.
Dictum at p. 31 disapproved. Vyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer, Vizagapatam **J. C. 302**

—— *Ma Tin* v. *Doop Raj Barna*, Chan-Toon L. C., vol. 1, 370, at 372.
Approved. Tan Ma Shwe Zin *v.* Khoo Soo Chong - **J. C. 527**

—— *Macdonald* v. *Riordan* (1899) Q. R. 8 Q. B. 555; 30 S. C. R. Can. 619.
Principle approved and applied. Montreal Trust Co. *v.* Canadian National Railway Co. **J. C. 613**

—— *MacKenzie* v. *Whitworth* L. R. 1 Ex. D. 36, at p. 43.
Referred to. Maurice *v.* Goldsbrough Mort & Co. - **J. C. 452**

—— *Missouri Steamship Co., In re* (1888) 42 Ch. D. 321.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Murugappa* v. *Munusami* (1920) 38 Mad. L. J. 131.
Referred to. Mahant Singh *v.* U Ba Yi - - - - **J. C. 601**

—— *Muzaffer Bey* v. *W. Collet* 6 Cyprus L. R. 108, at 109.
Referred to. Saadat Kamel Hanum *v.* Attorney-General for Palestine - - - - **J. C. 508**

—— *North British Insurance Co.* v. *Moffatt* L. R. 7 C. P. 25.
Referred to. Maurice *v.* Goldsbrough Mort & Co. - **J. C. 452**

—— *Nur Din* v. *Allah Ditta* (1932) I. L. R. 13 Lah. 817.
Referred to. Mahant Singh *v.* U Ba Yi - - - - **J. C. 601**

—— *Oriental Financial Corporation* v. *Overend Gurney & Co.* (1871) L. R. 7 Ch. D. 142, 153.
Referred to. Mahant Singh *v.* U Ba Yi - - - - **J. C. 601**

—— *Oxfordshire County Council* v. *Oxford City Council* [1938] 2 K. B. 415.
Reversed - - **H. L. (E.) 48**

—— *Parr's Banking Co., Ld.* v. *Yates* [1898] 2 Q. B. 460; 67 L. J. (Q. B.) 851.
Considered. Wright *v.* New Zealand Farmers Co-operative Association of Canterbury **J. C. 439**

—— *Petrel, The* - - [1893] P. 320.
Approved and applied. Radcliffe *v.* Ribble Motor Services, Ld. **H. L. (E.) 215**

—— *Petros M. Nomikos, Ld.* v. *Robertson* [1938] 2 K. B. 603.
Affirmed - - **H. L. (E.) 371**

—— *Pratt* v. *Pratt* - - [1939] P. 117.
Affirmed - - - **H. L. (E.) 417**

—— *Radcliffe* v. *Ribble Motor Services, Ld.* [1938] 2 K. B. 345.
Reversed - - - **H. L. (E.) 215**

—— *Ralli Bros.* v. *Compania Naviera Sota y Aznar* [1920] 2. K. B. 287.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Ranjit Singh* v. *Naubat* (1902) I. L. R. 24 A. 504.
Referred to. Mahant Singh *v.* U Ba Yi - - - - **J. C. 601**

—— *Reardon Smith Line, Ld.* v. *Black Sea and Baltic General Insurance Co.* [1938] 2 K. B. 730.
Reversed - - - **H. L. (E.) 562**

—— *Rex* v. *International Bondholders* [1937] A. C. 500, 520.
Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Ribble Motor Services, Ld.* v. *Radcliffe* [1938] 2 K. B. 345.
Reversed - - **H. L. (E.) 215**

—— *Roura & Forgas* v. *Townend* [1919] 1 K. B. 189.
Approved and applied. Robertson *v.* Petros M. Nomikos, Ld. **H. L. (E.) 371**

—— *Russell* v. *Palmer* (1767) 2 Wils. 325.
Principle of applied. Gokal Chand-Jagan *v.* Nand Ram Das-Atma Ram - - - - **J. C. 106**

—— *Saadat Kamel Hanum* v. *Attorney-General for Palestine* L. R. of Palestine (1920-1933), 866.
Affirmed - - - **J. C. 508**

—— *Sankana Kalana* v. *Virupakshapa Ganeshapa* (1883) I. L. R. 7 B. 146.
Referred to. Mahant Singh *v.* U Ba Yi - - - - **J. C. 601**

—— *Schooner Exchange* v. *M'Fadden* (1812) 7 Cranch, 116.
Referred to - - - **J. C. 160**

—— *Sidney* v. *North Eastern Railway Co.* [1914] 3 K. B. 629.
Referred to. Vyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer, Vizagapatam **J. C. 302**

CASES—*continued.*

—— *Stephen* v. *Cooper* [1929] A. C. 570. Discussed and distinguished. Harris *v.* Associated Portland Cement Manufacturers **H. L. (E.) 71**

—— *Subramania Aiyar* v. *Gopala Aiyar* (1909) I. L. R. 33 M. 308. Referred to. Mahant Singh *v.* U Ba Yi - - - - **J. C. 601**

—— *Sutherland Publishing Co.* v. *Caxton Publishing Co.* [1936] Ch. 323. Affirmed - - - **H. L. (E.) 178**
[1938] Ch. 174. Reversed. **H. L. (E.) 178**

—— *Tennant's Trustees* v. *Lord Advocate* 1938 S. C. 224. Affirmed - - - **H. L. (Sc.) 207**

—— *Tillekeratne* v. *Bastian* (1918) 21 C. N. L. R. 12, 17. Dictum disapproved - - **J. C. 136**

—— *Torni, The* - - - [1932] P. 78. Dissented from. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Trinidad Shipping Co.* v. *G. R. Alston & Co.* [1920] A. C. 888. Referred to. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

—— *Vickers-Armstrong* v. *Regan* [1933] 1 K. B. 232. Approved. Dobson Ship Repairing Co. *v.* Burton - - **H. L. (E.) 590**

—— *Vortigern, The* [1899] P. 140, 147. Considered. Northumbrian Shipping Co. *v.* E. Timm & Son, Ld. **H. L. (E.) 397**

—— *Waters* v. *Monarch Life Assurance Co.* 5 El. & Bl. 870. Referred to. Maurice *v.* Goldsbrough Mort & Co. **J. C. 452**

—— *Webb* v. *Hewitt* (1857) 3 K. & J. 438. Referred to. Mahant Singh *v.* U Ba Yi - - - - **J. C. 601**

—— *Wright* v. *New Zealand Farmers Co-operative Association of Canterbury* [1935] N. Z. L. R. 614 and [1936] N. Z. L. R. 157. Affirmed - - - - **J. C. 439**

CEYLON—*Prescriptive title to land—Ordinance No. XXII. of* 1871, *s.* 3 — *Construction.*
Judgment of the Supreme Court of the Island of Ceylon affirmed. Cadija Umma *v.* S. Don Manis Appu - - - **J. C. 136**

CHARITY—*Will—Gifts to vicar and churchwardens of two named parishes—"For parish "work"—Validity—Intestacy.*
Decision of the Court of Appeal [1938] Ch. 482 affirmed. Farley *v.* Westminster Bank - - - - - **H. L. (E.) 430**

CHARTERPARTY — *Contract voyage — Bunkering at port off geographical route—Whether deviation.*
Decision of Court of Appeal [1938] 2 K. B. 730 reversed. Reardon Smith Line, Ld. *v.* Black Sea and Baltic General Insurance Co. - - - - - **H. L. (E.) 562**

CHINESE BUDDHIST — Succession law applicable to - - - - **527**
See Burma.

COLLISION - - - - - - **94**
See Shipping **2.**

COMITY OF NATIONS—Foreign Sovereign State—Immunity of requisitioned ship from arrest - - - **256**
See International Law.

COMMON EMPLOYMENT—Doctrine of—Applicability - - - - **215**
See Master and Servant.

COMPETENCY OF APPEAL - - **497**
See West Africa.

CONFLICT OF LAWS — Bill of lading — Goods shipped in Newfoundland—Damage—Exemption from liability under English law - - **277**
See Contract **3.**

CONSTRUCTIVE TOTAL LOSS — Ship — Liability under freight policy **371**
See Insurance (Marine).

CONSULTATIVE CASE—Reasons for judgment should be stated - - **48**
See Local Government.

CONTRACT—*Bond—Gold clause—Estoppel —Proper law of contract—Effect of new legislation.*
New Brunswick Railway Co. *v.* British and French Trust Corporation **H. L. (E.) 1**

2. —— Carriage by air - - - **332**
See Carrier.

3. —— *Conflict of laws—Bill of lading —Shipment in Newfoundland—Contract not in conformity with direction of Newfoundland law—Clause in contract that it shall be governed by English law—Action in Nova Scotia—Proper law of contract — Newfoundland Carriage of Goods by Sea Act,* 1932, *s.* 3.
Judgment of the Supreme Court En Banc affirmed, but for different reasons. Vita Food Products, Inc. *v.* Unus Shipping Co. **J. C. 277**

4. —— *Guarantee—Suit against principal debtor and guarantor—Suit against principal debtor withdrawn—Liability of guarantor—Code of Civil Procedure (India Act V. of* 1908), *Order* xxiii., *r.* 1—*Indian Contract Act (IX. of* 1872), *ss.* 2 (*g*) *and* (*j*), 134 *and* 139.
Decree of the High Court reversed. Mahant Singh *v.* U Ba Yi - - - **J. C. 601**

CONTRACT—*continued.*

5. —— Loan at Gibraltar — Cheque in Spanish pesetas—Repayment **145**
See Gibraltar.

6. —— With railway company—Director interested for his own use and benefit — Statutory prohibition — Contract void - - - **613**
See Canada (Quebec).

CONTRACT VOYAGE — Bunkering at port off geographical route — Whether deviation - - - - **562**
See Charterparty.

CONVENTION OF WARSAW—Air carriage
See Carrier. **332**

CONVERSION, ACT OF—Infringement of copyright - - - . - **178**
See Copyright.

COPYRIGHT—*Damages*—*Act of conversion*—*Limitation of time for commencement of action*—*Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 6, 7, 10, 35.
Decision of the Court of Appeal [1936] Ch. 323 affirmed. Decision of the Court of Appeal [1938] Ch. 174 reversed. Caxton Publishing Co. *v.* Sutherland Publishing Co. - - - - - **H. L. (E.) 178**

COURT OF CRIMINAL APPEAL — Constitution—Statutory regulation **484**
See Trinidad and Tobago.

COVENANT—In lease—To spend specific sum each year on repairs—Breach—Whether debt or damages - **544**
See Landlord and Tenant.

DAMAGES—Infringement of copyright **178**
See Copyright.

DEATH DUTY—Whether proceeds of life insurance policy to be aggregated with deceased's general estate **207**
See Revenue.

DEVIATION — Bunkering at port off geographical route of contract voyage - - - - **562**
See Charterparty.

DIRECTOR — Of railway company — Interested in contract with company for his own use and benefit—Statutory prohibition — Contract void - - - - - **613**
See Canada (Quebec).

DISCRETION—Wrongful exercise of—Refusal to entertain appeal - **497**
See West Africa.

DIVORCE—*Desertion*—"*Without cause*" —*Termination*—*Request by deserting spouse for interview to discuss resumption of cohabitation*

DIVORCE—*continued.*

—*Refusal by innocent spouse*—*Matrimonial Causes Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 2.
Decision of the Court of Appeal [1939] P. 117 affirmed. Pratt *v.* Pratt **H. L. (E.) 417**

DOMINIONS AND COLONIES.
See Australia, Canada, Ceylon, Gibraltar, India, New Zealand, Newfoundland, Palestine, Trinidad and Tobago, and West Africa.

ECCLESIASTICAL LAW—*Union of benefices*—*Principles to be applied*—*Union of Benefices Measure,* 1923 (14 *&* 15 *Geo.* 5, *No.* 2)—*Union of Benefices (Amendment) Measure,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *No.* 2)—*Effect of amendment.*
Appeal allowed. Union of the Benefices of Westoe and South Shields, St. Hilda, *In re* - - - - - - **J. C. 269**

ESTATE DUTY—Policy of life insurance for payment of death duties—Whether proceeds to be aggregated with deceased's general estate - **207**
See Revenue.

ESTOPPEL—Judgment by default - - **1**
See Contract.

FOREIGN ARMED SHIP—In British territorial waters—Murder of captain by member of crew—Jurisdiction of local British Court to try accused person - - - - - **160**
See International Law **2.**

FOREIGN SOVEREIGN STATE — Requisitioned ship—Immunity from arrest - - - - - **256**
See International Law.

FREIGHT—Insurance on—Constructive total loss of vessel—Liability under policy
See Insurance (Marine). **371**

GIBRALTAR—*Contract*—*Loan at Gibraltar by cheque in Spanish pesetas*—*Bond securing repayment of pesetas*—*Spanish Government decree making "guias" necessary for legal importation of Bank of Spain notes*—*Loan repayable by peseta notes with "guias" or their equivalent in sterling.*
Judgment of the Supreme Court of Gibraltar affirmed. Pyrmont, Ld. *v.* Schott **J. C. 145**

GOLD COAST—Statutory appeal provisions—Competency of appeal—Exercise of discretion - - - - **497**
See West Africa.

GOLD CLAUSE — Bond — Protection of holders against depreciation - **1**
See Contract.

GUARANTEE—Continuing—Limitation **439**
See New Zealand.

2. —— Suit against principal debtor and guarantor—Suit against principal debtor withdrawn — Liability of guarantor - - - - **601**
See Contract **4**.

INDIA.
See Contract **4**.

2. —— Compulsory land acquisition - **302**
See Land Acquisition.

3. —— *Principal and Agent — Commercial transactions through agent — Debts due to principal from third party—Financial embarrassment of debtor—Credit given by agent —Duty of agent to make best bargain possible —Burden of proof.*

Decree of the High Court affirmed. Gokal Chand-Jagan Nath *v.* Nand Ram Das-Atma Ram - - - - - **J. C. 106**

INSTITUTE TIME CLAUSES, FREIGHT **371**
See Insurance (Marine).

INSURABLE INTEREST - - - **452**
See Australia.

INSURANCE (FIRE)—Wool consigned to brokers for sale — Destroyed by fire in brokers' store—Apportionment of insurance money—Respective interests of brokers and owner —Brokers not entitled to retain prospective profits and charges **452**
See Australia.

2. —— **(LIFE)**—Policy to meet death duties—Whether proceeds to be aggregated with deceased's general estate - - - - - **207**
See Revenue.

3. —— **(MARINE)** — *Insurance on hull —Insurance on freight—" In the event of " constructive total loss of steamer "—Incorporation of Institute Time Clauses, Freight — Vessel damaged by fire—Cost of repairs more than insured value— Vessel when repaired worth more than cost of repairs—Charter party not performed—Freight not received—No abandonment to hull underwriters—Claim against hull underwriters for partial loss and against freight underwriters for constructive total loss—Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *ss.* 60, 61.

Decision of Court of Appeal [1938] 2 K. B. 603 affirmed. Robertson *v.* Petros M. Nomikos, Ld. - - - **H. L. (E.) 371**

INTERNATIONAL LAW—*Comity of nations —Immunity of ship from arrest—Foreign sovereign State — Requisition — Possession— Vessel already under arrest—De facto and de jure governments—Arrest by Republican Government of Spain of vessel requisitioned by Nationalist Government.*

Decision of Court of Appeal [1939] P. 37 affirmed. The Arantzazu Mendi **H. L. (E.) 256**

INTERNATIONAL LAW—*continued.*

2. —— *Foreign armed public ship—In British territorial waters—Vessel not a floating piece of foreign territory—Murder of captain on board by member of crew—Both British subjects—Accused arrested on shore—No diplomatic request for surrender by foreign government—Waiver of immunity—Jurisdiction of local British Court to try accused.*

Judgment of the Full Court of Hong Kong (1937) 29 H. K. L. R. 22 affirmed. Chung Chi Cheung *v.* The King **J. C. 160**

JUDICIAL COMMITTEE APPEALS.
See Australia, Canada, Ceylon, Gibraltar, India, New Zealand, Newfoundland, Palestine, Trinidad and Tobago, and West Africa.

LAND—Compulsory acquisition—Potentialities — Acquiring authority sole possible purchaser of potentiality
See Land Acquisition. **302**

LAND ACQUISITION — *Compulsory acquisition — Potentialities — Acquiring authority sole possible purchaser of potentiality — Valuation—Land Acquisition Act (I. of* 1894), *ss.* 23, 24.

Judgment of High Court on principle of valuation of potentialities reversed. Vyricherla Narayana Gajapatiraju *v.* Revenue Divisional Officer, Vizagapatam **J. C. 302**

LANDLORD AND TENANT — *Lease — Covenant to expend specific sum each year on repairs—Breach—Whether debt or damages—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

Decision of the Court of Appeal reversed. Moss' Empires, Ld. *v.* Olympia (Liverpool), Ld. - - - - - **H. L. (E.) 544**

LEASE—Covenant to spend specific sum each year on repairs—Breach—Whether debt or damages - **544**
See Landlord and Tenant.

LEGISLATIVE COMPETENCY — Canadian Provincial legislation amalgamating municipalities—Scheme to meet indebtedness—Validity - - **468**
See Canada (Ontario).

LEGISLATIVE ILLUSTRATIONS—Functions of - - - - - - **508**
See Palestine.

LIMITATION—Action by Mutawalli to recover wakf property—Time from which period of limitation runs **508**
See Palestine.

2. —— Action for infringement of copyright and conversion - - **178**
See Copyright.

LIMITATIONS, STATUTE OF—Continuing guarantee - - - - **439**
See New Zealand.

LOCAL GOVERNMENT — *Alteration of areas—Act extending boundary of city—Transfer of districts from county to city—Subsequent Act making county council the district road authority and the poor law authority—Increased burden on county ratepayers—Adjustment of financial relations—Increased burden whether due to extension Act or to subsequent Act—Arbitration—Amount of compensation—Oxford Extension Act,* 1928 (18 & 19 *Geo.* 5, *c. lxxxiv.*), *ss.* 4, 5, 33, 61 —*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 62—*Local Government* (*Adjustments*) *Act,* 1913 (3 & 4 *Geo.* 5, *c.* 19), *s.* 1; *Schedule, Part II.* (1.), (2.), (3.) — *Local Government Act,* 1929 (19 & 20 *Geo.* 5, *c.* 17), *s.* 113, *sub-ss.* 1, 2; *s.* 117, *sub-s.* 4.

Decision of Court of Appeal [1938] 2 K. B. 415 reversed. Oxford City Council *v.* Oxfordshire County Council **H. L. (E.) 48**

MASTER AND SERVANT—*Common employment—Drivers of motor coaches in service of same employers—Coaches carrying parties to same destination—Return to garage—Death of one driver owing to negligence of another driver—Liability of employers.*

Decision of the Court of Appeal [1938] 2 K. B. 345 reversed. Radcliffe *v.* Ribble Motor Services, Ld. - - **H. L. (E.) 215**

MEJELLE (OTTOMAN CIVIL CODE) - **508**
See Palestine.

MORTGAGE—Sale of mortgaged property—Default by purchaser—Sale not completed—Mortgagee not accountable to mortgagor for agreed purchase price - - - - **439**
See New Zealand.

MUNICIPALITY — Statutory amalgamation of municipalities — Scheme to meet indebtedness—Whether Act and scheme within legislative competence of Canadian Provincial Legislature - - - - **468**
See Canada (Ontario).

MUTAWALLI—Action to recover wakf property—Limitation - - **508**
See Palestine.

NEW ZEALAND—*Mortgage—Sale of mortgaged property—Default by purchaser—Sale not completed—Contract rescinded by mortgagee—Subsequent resale at lower price to another purchaser—Mortgagee not accountable to mortgagor for agreed purchase price on first uncompleted sale—Land Transfer Act,* 1915, *Fourth Schedule, cl.* 7—*Guarantee—Construction—Limitation.*

Judgment of the Court of Appeal of New Zealand [1935] N. Z. L. R. 614 and [1936] N. Z. L. R. 157, affirmed. Wright *v.* New Zealand Farmers Co-operative Association of Canterbury - - - **J. C. 439**

NEWFOUNDLAND—Carriage of Goods by Sea Act, 1932 - - - **277**
See Contract **3**.

ONTARIO.
See Canada (Ontario).

OTTOMAN CIVIL CODE—Limitation articles
See Palestine. **508**

PALESTINE—*Wakf—Action by mutawalli to recover wakf property—Limitation—Time from which period of limitation runs—Function of illustrations in legislative enactments—Ottoman Civil Code* (*Mejelle*), *Book XIV., arts.* 1660–1667.

Judgment of the Supreme Court of Palestine (1933) L. R. of Palestine (1920-1933), 866, affirmed. Saadat Kamel Hanum *v.* Attorney-General for Palestine - - - - - - - **J. C. 508**

PORT OF LONDON BY-LAWS—Duty thereunder to avoid collision - - **94**
See Shipping **2**.

PRESCRIPTIVE TITLE TO LAND IN CEYLON - - - - **136**
See Ceylon.

PRINCIPAL AND AGENT — Commercial transactions through agent—Credit given by agent—Financial embarrassment of debtor — Agent's duty - - - - - **106**
See India **3**.

PRIVY COUNCIL APPEALS.
See Judicial Committee Appeals.

QUEBEC.
See Canada (Quebec).

RAILWAY — Contract with company — Director interested for his own use and benefit—Statutory prohibition — Contract void - - **613**
See Canada (Quebec).

REVENUE—*Estate duty—Property deemed to pass on death—Aggregation—Policy of insurance assigned to trustees during lifetime of deceased in trust for payment of death duties—Whether proceeds to be aggregated with deceased's general estate for assessing rate of duty—Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *ss.* 2, *sub-s.* 1 (*d*), 4.

Decision of First Division of Court of Session 1938 S. C. 224 affirmed. Tennant *v.* Lord Advocate - - **H. L. (Sc.) 207**

SHIP—Constructive total loss — Liability under freight policy—Institute Time Clauses, Freight - - - **371**
See Insurance (Marine).

2. —— Insufficient bunkers on sailing — Total loss when deviating to obtain coal — Vessel unseaworthy — Liability of shipowner - - **397**
See Shipping.

SHIP—*continued.*

3. —— Requisitioned by foreign Sovereign State—Immunity from arrest **256**
See International Law.

SHIPPING—*Bill of lading—Shipment from Canadian port—Ship with insufficient bunkers—Loss of ship and cargo—Liability of shipowners—Canadian Water Carriage of Goods Act,* 1910 (*R. S. C.,* 1927, *c.* 207).

Decision of the Court of Appeal affirmed. Northumbrian Shipping Co. *v.* E. Timm & Son, Ld. - - - - **H. L. (E.) 397**

2. —— *Collision—Port of London River By-laws—Duty thereunder—Whether one vessel entitled to expect other vessel to comply with by-laws—Failure to reduce speed substantially earlier.*

Decision of Court of Appeal affirmed. S.S. Heranger (Owners) *v.* S.S. Diamond (Owners) - - - - **H. L. (E.) 94**

STATUTE OF LIMITATIONS—Continuing guarantee - - - - **439**
See New Zealand.

STATUTES :—

I. Imperial.

1867.

30 & 31 Vict. c. 3 (British North America), s. 91 (19), (21) ; s. 92 (8) : Ladore *v.* Bennett - - - **J. C. 468**

—— s. 91 (15.) (16.) ; s. 92 (2.) : Att.-Gen. for Alberta *v.* Att.-Gen. for Canada - - **J. C. 117**

1888.

51 & 52 Vict. c. 41 (Local Government Act), s. 62 : Oxford City Council *v.* Oxfordshire County Council **H. L. (E.) 48**

1894.

57 & 58 Vict. c. 30 (Finance), s. 2, sub-s. 1 (*d*) ; s. 4 : Tennant *v.* Lord Advocate - - **H. L. (Sc.) 207**

1906.

6 Edw. 7, c. 41 (Marine Insurance), ss. 60, 61 : Robertson *v.* Petros M. Nomikos, Ld. - **H. L. (E.) 371**

1911.

1 & 2 Geo. 5, c. 46 (Copyright), ss. 6, 7, 10, 35 : Caxton Publishing Co. *v.* Sutherland Publishing Co. **H. L. (E.) 178**

1913.

3 & 4 Geo. 5, c. 19 (Local Government (Adjustment) Act), s. 1 ; Schedule Part II. (1.), (2.), (3.) : Oxford City Council *v.* Oxfordshire County Council - **H. L. (E.) 48**

STATUTES—*continued.*

1923.

14 & 15 Geo. 5, No. 2 (Union of Benefices Measure) : Union of the Benefices of Westoe and South Shields, St. Hilda, *In re* - **J. C. 269**

1925.

15 & 16 Geo. 5, c. 84 (Workmen's Compensation), s. 1 : Harris *v.* Associated Portland Cement Manufacturers - - - **H. L. (E.) 71**

—— s. 11, sub-s. 2 : Dobson Ship Repairing Co. *v.* Burton - **H. L. (E.) 590**

1926.

16 & 17 Geo. 5, c. 42 (Workmen's Compensation), s. 1 : Dobson Ship Repairing Co. *v.* Burton **H. L. (E.) 590**

1927.

17 & 18 Geo. 5, c. 36 (Landlord and Tenant), s. 18, sub-s. 1 : Moss' Empires, Ld. *v.* Olympia (Liverpool), Ld. - - **H. L. (E.) 544**

1928.

18 & 19 Geo. 5, c. lxxxiv. (Oxford Extension), ss. 4, 5, 33, 61 : Oxford City Council *v.* Oxfordshire County Council - **H. L. (E.) 48**

1929.

19 & 20 Geo. 5, c. 17 (Local Government), s. 113, sub-ss. 1, 2 ; s. 117, sub-s. 4 : Oxford City Council *v.* Oxfordshire County Council **H. L. (E.) 48**

1932.

22 & 23 Geo. 5, c. 36 (Carriage by Air), s. 1, sub-s. 2 ; Sch. 1 : Philippson *v.* Imperial Airways, Ld. **H. L. (E.) 332**

1936.

26 Geo. 5 & 1 Edw. 8, No. 2 (Union of Benefices (Amendment) Measure) : Union of the Benefices of Westoe and South Shields, St. Hilda, *In re* - - **J. C. 269**

1937.

1 Edw. 8 & 1 Geo. 6, c. 57 (Matrimonial Causes), s. 2 : Pratt *v.* Pratt **H. L. (E.) 417**

II. Dominion and Colonial.

Burma.

1898.

Act XIII. (Burma Laws Act), s. 13, sub-ss. 1, 2, 3 : Tan Ma Shwe Zin *v.* Khoo Soo Chong **J. C. 527**

STATUTES—*continued.*

CANADA.

1910.

Canadian Water Carriage of Goods Act (now R. S. C., 1927, c. 207): NORTHUMBRIAN SHIPPING CO. *v.* E. TIMM & SON, LD. - **H. L. (E.) 397**

1927.

R. S. C., c. 170 (Railway Act), s. 121: MONTREAL TRUST CO. *v.* CANADIAN NATIONAL RAILWAY CO. **J. C. 613**

R. S. C., c. 207 (Canadian Water Carriage of Goods), s. 6: NORTHUMBRIAN SHIPPING CO. *v.* E. TIMM & SON, LD. - - - - **H. L. (E.) 397**

1932.

S. O., c. 27 (Ontario Municipal Board), Part VI.: LADORE *v.* BENNETT **J. C. 468**

1935.

S. O., c. 16 (Department of Municipal Affairs), Part III.: LADORE *v.* BENNETT - - - **J. C. 468**

S. O., c. 51 (Ontario Municipal Board), Part VI.: LADORE *v.* BENNETT **J. C. 468**

S. O., c. 74 (City of Windsor (Amalgamation)): LADORE *v.* BENNETT **J. C. 468**

1936.

S. O., c. 66 (City of Windsor (Amalgamation) Amendment): LADORE *v.* BENNETT - - - **J. C. 468**

CEYLON.

1871.

Ordinance No. XXII., s. 3: CADIJA UMMA *v.* S. DON MANIS APPU - **J. C. 136**

INDIA.

1872.

Act IX. (Indian Contract Act), s. 2 (*g*), (*j*); ss. 134, 139: MAHANT SINGH *v.* U BA YI - - - **J. C. 601**

1894.

Act I. (Land Acquisition), ss. 23, 24: VYRICHERLA NARAYANA GAJAPATIRAJU *v.* REVENUE DIVISIONAL OFFICER, VIZAGAPATAM - **J. C. 302**

1908.

Act V. (Code of Civil Procedure), Order XXIII., r. 1: MAHANT SINGH *v.* U BA YI - - - - **J. C. 601**

STATUTES—*continued.*

NEW ZEALAND.

1915.

No. 35 (Land Transfer Act), Fourth Sch., cl. 7: WRIGHT *v.* NEW ZEALAND FARMERS CO-OPERATIVE ASSOCIATION OF CANTERBURY **J. C. 439**

NEWFOUNDLAND.

1932.

(Carriage of Goods by Sea Act), s. 3: VITA FOOD PRODUCTS, INC. *v.* UNUS SHIPPING CO. - **J. C. 277**

TRINIDAD AND TOBAGO.

1880.

c. 35 (Judicature Ordinance) (as amended), ss. 3, 4, 5, 6, 7: BUTLER *v.* THE KING - - - - **J. C. 484**

1931.

No. 31 (Criminal Appeal Ordinance), s. 3: BUTLER *v.* THE KING **J. C. 484**

1936.

Judicature (Amendment) Ordinance, ss. 4, 5: BUTLER *v.* THE KING **J. C. 484**

WEST AFRICA.

1927.

No. 18 (Native Administration Ordinance), ss. 75, 76, 77: ADABLA *v.* GBEVLO AGAMA - - - - **J. C. 497**

1935.

No. 18 (Native Administration Amendment Ordinance), s. 13: ADABLA *v.* GBEVLO AGAMA - - **J. C. 497**

STATUTORY PROHIBITION — Director of railway company — Interested in contract with company for his own use and benefit—Contract void - - - - - **613**
See CANADA (QUEBEC).

TRINIDAD AND TOBAGO — *Court of Criminal Appeal—Constitution — Statutory regulation—Chief Justice and Puisne Judges—Acting Judges of Supreme Court not competent members of Court of Criminal Appeal—Judicature Ordinance,* 1880, *c.* 35, *as amended, ss.* 3, 4, 5, 6 *and* 7—*Judicature* (*Amendment*) *Ordinance,* 1936, *ss.* 4, 5—*Criminal Appeal Ordinance, No.* 31 *of* 1931, *s.* 3.
BUTLER *v.* THE KING - - **J. C. 484**

UNION OF BENEFICES — Principles applicable - - - - - **269**
See ECCLESIASTICAL LAW.

WAKF—Action to recover wakf property—Limitation - - - - **508**
See PALESTINE.

WARSAW, CONVENTION OF—Air Carriage **332**
See CARRIER.

WEST AFRICA—*Gold Coast — Statutory appeal provisions — Construction — Competency of appeal—Exercise of discretion—Native Administration Ordinance (Gold Coast), No.* 18 *of* 1927, *ss.* 75, 76 *and* 77—*Native Administration Amendment Ordinance (Gold Coast), No.* 18 *of* 1935, *s.* 13.
Judgment of the West African Court of Appeal reversed in part. ADABLA *v.* GBEVLO AGAMA - - - - - - **J. C. 497**

WILL — Gift for "parish work" — Not charitable—Invalid - - **430**
See CHARITY.

WORDS :—

—— "Application for the review": DOBSON SHIP REPAIRING CO. *v.* BURTON **H. L. (E.) 590**

WORKMEN'S COMPENSATION — *Accident arising out of the employment—Workman in course of employment drying his leggings near turbine—While doing so going too near revolving fan, in which his hand was caught—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1.
HARRIS *v.* ASSOCIATED PORTLAND CEMENT MANUFACTURERS - - - **H. L. (E.) 71**

2. —— *Infant apprentice — Accident — Application for review of weekly payment—Whether letter a sufficient application — "Review"—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 11, *sub-s.* 2—*Workmen's Compensation Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 42), *s.* 1.
Decision of Court of Appeal affirmed. DOBSON SHIP REPAIRING CO. *v.* BURTON **H. L. (E.) 590**

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(p. 1 to p. 177).

Part I.—March 1.

TABLE OF CASES.

APPEAL CASES.

		PAGE
Attorney-General for Alberta *v.* Attorney-General for Canada	P. C.	117
Cadija Umma *v.* S. Don Manis Appu	P. C.	136
Chung Chi Cheung *v.* The King	P. C.	160
Gokal Chand-Jagan Nath *v.* Nand Ram Das-Atma Ram	P. C.	106
Harris *v.* Associated Portland Cement Manufacturers, Ld.	H. L. (E.)	71
Heranger, S.S. (Owners) *v.* S.S. Diamond (Owners)	H. L. (E.)	94
New Brunswick Ry. Co. *v.* British and French Trust Corporation	H. L. (E.)	1
Oxford City Council *v.* Oxfordshire County Council ..	H. L. (E.)	48
Pyrmont, Ld. *v.* Schott	P. C.	145

For Mode of Citation, see Beginning of Index.

[*For Names of Editors and Reporters see Inside.*]

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